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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-358

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Petitioner,

v.

COMMERCE TANKERS CORPORATION,

and

VANTAGE STEAMSHIP CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on April 15, 1977.

Opinions Below

The opinion of the Court of Appeals is reported at 553 F. 2d 793 and reprinted in Appendix A. The opinion of the District Court for the Southern District of New York is reported at 411 F. Supp. 1224 and reprinted in Appendix D.

Jurisdiction

The judgment of the Court of Appeals (Appendix B) was entered on April 15, 1977; and a petition for rehearing by respondent Commerce Tankers Corporation ("Commerce") was denied on June 15, 1977 (Appendix C). This Court's jurisdiction to review the judgment below is based on 28 U.S.C. §1254(1).

Question Presented

Petitioner National Maritime Union ("NMU"), a labor organization representing unlicensed seamen, and respondent Commerce, a shipping company, included in their collective bargaining agreement a provision requiring Commerce to obtain from a purchaser of its vessels a commitment to assume the NMU agreement for the remainder of its term. Ignoring that provision, Commerce contracted to sell a vessel to respondent Vantage Steamship Corp. ("Vantage"), which had bargaining relations with another union and no intention of assuming the NMU agreement. The NMU obtained an arbitral award requiring Commerce to comply with the collective agreement and, thereafter, a preliminary injunction from a United States District Court enforcing the award and enjoining a sale without compliance with the contract. Apart from these proceedings, NMU did not take or threaten any other action to enforce the contract provisions involved. The preliminary injunction was subsequently reversed. Commerce and Vantage, claiming that the collective bargaining provision violated the antitrust laws, seek treble damages for losses caused by the preliminary injunction.

The question presented is:

> Whether treble damages may be awarded in a Sherman Act suit based on a collective bargaining contract provision allegedly violative of that Act, when the contract provision was ignored by the employer party and the only damages resulted from a preliminary injunction enforcing an arbitration award and enjoining breach of that clause, issued by a United States District Court at the behest of the union party.

Statutes Involved

Sherman Act, §1 (15 U.S.C. §1):

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal; . . . ."

Clayton Act, §4 (15 U.S.C. §4):

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Statement of the Case

For many years Commerce, an American flag shipping company, has had collective bargaining agreements with NMU. During the late 1950's and 1960's, jobs in the American merchant marine declined sharply because of technological developments, the increasingly successful competition of low-wage foreign flag ships, and the demise of the American flag passenger fleet. In 1969, the NMU

and two other maritime unions (Masters, Mates and Pilots and American Radio Association), in separate negotiations, secured from the shipowners, including Commerce, a protective "sale and transfer" provision, modelled on a clause obtained previously by the Marine Engineers Beneficial Association, a labor organization representing licensed engineers in the American merchant marine.[1] The NMU's clause, expressly designed to preserve the "jobs and job rights" of employees represented by the union, provided in general that (1) if a vessel covered by the agreement was sold to an American flag company, the NMU would continue to furnish its crew; (2) the seller would secure from the prospective buyer a commitment to honor the NMU's collective agreement with the seller; and (3) the seller would give the union advance notice of the prospective sale.[2]

In late 1970 Commerce's parent, Vernitron Corporation, decided to terminate its maritime activities by selling the two ships owned by Commerce, the S/S Thalia and the S/S Barbara. The Thalia was sold to a company that happened to have bargaining relationships with NMU, and the purchaser gave and honored the commitment prescribed by the NMU agreement.

On December 23, 1970 Commerce and Vantage contracted for the sale of the S/S Barbara for $2,750,000. The

[1] The principal NMU negotiations involve two employer associations, the Maritime Service Committee, representing dry cargo operators, and the Tanker Service Committee, representing tanker companies. Non-members, called "independents," are invited to participate in these negotiations. Some independents do so; others, like Commerce in 1969, do not. Commerce stipulated at trial, and the District Court found, that Commerce was a party to and bound by the resulting agreement.

[2] The NMU-Commerce "sale and transfer" clause, which forms the basis of this suit, is quoted in full in the District Court's opinion at 31a.

draft agreement prepared by Commerce's attorney required the purchaser to assume the NMU contract, but at Vantage's insistence that clause was deleted. Vantage's unlicensed seamen were represented by another labor organization, the Seafarers International Union ("SIU"); and Vantage's agreement with SIU covered after-acquired vessels.

Commerce failed to notify NMU of its intended sale of the Barbara, but early in January 1971, NMU learned of the contemplated sale through the trade press. The union asked Commerce whether the purchaser had committed itself to assume the NMU agreement. On January 13, 1971 Commerce's President gave written assurances that the commitment would be forthcoming.

NMU soon discovered, however, that Commerce's assurances failed to reflect either the contract of sale or Vantage's plans. Accordingly, NMU initiated arbitration against Commerce pursuant to their collective agreement. Before the arbitrator, Theodore W. Kheel, Commerce admitted that its ship sale contract with Vantage did not contain the contractually prescribed undertaking. Consequently, the arbitrator issued an award prohibiting any sale of the Barbara without compliance with the sale and transfer clause. NMU moved to confirm the award before the United States District Court in New York. Vantage intervened; and after the issuance and subsequent dissolution of a temporary restraining order, the matter was heard by Judge Marvin E. Frankel.

On February 23, 1971, Judge Frankel orally restored the temporary restraining order, and on March 2nd he issued a preliminary injunction enforcing the arbitral prohibition, conditioned on NMU's furnishing an injunction bond of $10,000. Judge Frankel's opinion, reported at 325 F. Supp. 360, rejected the companies' contentions that

the sale and transfer clause violated both the Sherman Act and Section 8(e) of the National Labor Relations Act, 29 U.S.C. §158(e). Since NMU promptly furnished the requisite injunction bond, the preliminary injunction prevented the sale which Commerce and Vantage were on the point of consummating.

Neither Commerce nor Vantage moved the Court of Appeals for an increase of the injunction bond, for a stay of Judge Frankel's injunction order, or for an expedited appeal. Indeed, Commerce sought and obtained three extensions of time for the filing of appellate briefs.

In late May, the Regional Director of the NLRB, pursuant to charges filed by Vantage, issued a complaint against NMU under Section 8(e), and initiated the injunctive proceedings routinely required by Section 10(*l*) of the NLRA. 29 U.S.C. §160(*l*). On July 15, 1971, District Judge Croake denied both an injunction against NMU and Commerce's motion to vacate Judge Frankel's injunction. Thereupon Commerce finally moved the Court of Appeals to dissolve that injunction or to increase the bond. The Court of Appeals denied that motion but directed that the appeal be expedited. Thereafter, the NLRB's appeal from Judge Croake's order was consolidated with the appeal from Judge Frankel's preliminary injunction. On March 22, 1972, the Court of Appeals reversed both orders, vacating the preliminary injunction and directing issuance of the Section 10(*l*) injunction sought by the Regional Director. 457 F.2d 1127.[3]

[3] In the NLRB's Section 8(e) proceedings, the Administrative Law Judge recommended dismissal of the complaint; the Board disagreed, holding the sale and transfer clause invalid under Section 8(e), 196 NLRB No. 165. The Court of Appeals, in enforcing the Board's order, 486 F. 2d 907, *cert. den'd* 416 U.S. 970, referred to the "knotty legal problems" "difficult to decide" because of "the closeness of these competing arguments."

In May, 1972, Commerce sold the Barbara to another American flag company—an NMU contract company, as it happened—for $700,000.[4] Commerce also recovered an additional $700,000 from Vantage in settlement of a commercial arbitration proceeding between the two companies. In the present action Commerce claims damages of $1,550,000, consisting essentially of Vantage's contract price plus alleged additional ship maintenance costs, less the proceeds of the vessel's sale and the recovery from Vantage. Vantage claims damages of $2,230,000, consisting of anticipated profits from the charter it had negotiated for the Barbara plus the $700,000 paid to Commerce.[5] Since both companies seek treble damages under the Sherman Act, their claims against NMU exceed $11,000,000.

Despite the complex proceedings related to this action, two critical facts are clear. Both were found by the District Court (60a-61a) and are fully supported by the evidence, and both findings were left undisturbed by the Court of Appeals:

1. NMU's effort to enforce the sale and transfer clause consisted solely of the institution of contractually provided arbitration and the subsequent judicial proceeding, in the United States District Court, to enforce the arbitration award. NMU neither took nor threatened economic or coercive action, such as strikes or picketing.

[4] Following the issuance of the preliminary injunction, Commerce received proposals for purchase of the Barbara at prices exceeding its ultimate selling price. Although much of the trial concerned the responsibility for the failure to consummate these proposals and, earlier, to salvage a charter for the Barbara negotiated by Vantage prior to initiation of the arbitral and judicial proceedings, those issues are not germane to the present petition.

[5] Commerce counterclaimed in the original NMU action. Vantage brought a separate action against NMU which was then consolidated with the NMU-Commerce suit.

2. All damages sought in this action resulted from the preliminary injunction issued by Judge Frankel. Commerce —and Vantage—totally ignored the sale and transfer provision of the NMU collective bargaining agreement. They made every effort to transfer the vessel either before the Court could act or during the interval between the dissolution of the temporary restraining order and the hearing on the application for a preliminary injunction. Pleadings by both companies in the present action allege that only the Court order blocked the sale (Appendix in Court of Appeals, 199a and 232a). And the President of Vernitron, Commerce's parent, testified at trial (Tr. Transcript, p. 575):

> "If there were no injunction the sale would have been completed and none of us would be in this room today."

The Decisions Below

Judge Griesa found it unnecessary to reach the merits of plaintiffs' antitrust claim that the sale and transfer clause in the collective agreement constituted an illegal group boycott. In any event, he held, the proximate cause of the injuries claimed by both Commerce and Vantage "was the preliminary injunction issued by Judge Frankel in a case admittedly involving close and difficult questions of law", and accordingly the only damages incurred were not recoverable in an antitrust action. Judge Griesa did award judgment to Commerce for the amount of the injunction bond (60a-61a, 65a).

The Court of Appeals, also without reaching the merits of the antitrust claim, reversed and remanded, instructing the District Court to decide the antitrust claim. The reviewing Court noted the NMU contention that "good faith resort to the courts cannot be a basis for liability" and

the NMU's supporting authorities, including *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127; *United Mine Workers of America* v. *Pennington*, 381 U.S. 657, 669-670; and *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510-511, but rejected their applicability on the ground that "they do not stand for the proposition that a group boycott that is illegal under the antitrust laws can be immunized from liability by a later law suit to enforce it" (13a). The Court said that had Commerce and Vantage sued first, their antitrust action would not have been "barred" by a subsequent legal proceeding on NMU's part. The Court also stated that under the Sherman Act, an antitrust violation need be only "a material cause" or "a substantial factor" in the occurrence of damage; in the Court's view, the "disputed clause and the NMU's determined efforts to enforce it were the proximate cause of injury to appellants" (12a-14a).[6]

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[6] The Court below decided on the merits the issue raised in this petition, and its decision is the law of the case subject only to review by this Court. The reversal sought through this petition would reinstate the final judgment of the District Court and end the litigation. Accordingly, that issue is now ripe for review.

We also believe that on the merits of the antitrust claim, the trial record establishes the applicability of the labor exemption: the challenged provision was plainly directed at preserving jobs of seamen represented by the NMU and entitled to ship out of its hiring hall; it required merely that a specific collective agreement continue to govern employment relations aboard an existing NMU contract vessel for the remainder of the contract term; it was incorporated in a collective bargaining agreement which already covered the vessel in question; and it represents a form of successorship obligation common in American labor relations. Nevertheless, we recognize that neither Court below reached the merits of the labor exemption issue, and no findings of fact expressly addressed that issue. For that reason alone, we have not presented the labor exemption issue in this petition. If, however, either Commerce or Vantage petitions for review of antitrust questions in this case, we ask that this petition be deemed to include the question of whether the evidence required a dismissal of the Sherman Act claims on the basis of the labor exemption.

Reasons for Granting the Writ

The decision below conflicts with important principles underlying decisions of this Court that provide Constitutional protection to the right to petition the branches of government, including the judiciary. See cases cited at p. 9, *supra*. It also directly conflicts with a decision of the Court of Appeals for the Tenth Circuit, *Adolph Coors Company* v. *A&S Wholesalers, Inc.*, 1977-2 CCH Trade Cases ¶61,565, decided on July 29, 1977, after issuance of the decision below, and reprinted in Appendix E.

I.

The Decision Below Conflicts With Important Constitutional Principles Established by Decisions of This Court.

The "philosophy" (*California Motor Transport*, 404 U.S. at 510) on which the decisions cited above rest is commonly known as the *Noerr-Pennington* doctrine. Under that doctrine, efforts to obtain legislative *(Noerr)*, executive *(Pennington)* or judicial *(California Motor Transport Co.)* action cannot be the basis of liability under the Sherman Act; nor are damages resulting from such governmental action recoverable from the private petitioners, regardless of their anticompetitive motivation and objective.[7] To permit recovery of such damages, this Court has recognized,

[7] *California Motor Transport Co.* recognized an exception in the case of "sham" proceedings. There is no claim here, and not the slightest evidence, that the proceedings in the United States District Court were fraudulent or "sham". On the meaning of "sham" in this context, see *Semke* v. *Enid Automobile Dealers Ass'n*, 456 F. 2d 1361; *Israel* v. *Baxter Laboratories, Inc.*, 466 F. 2d 272, 278; and *Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Board of Culinary Workers*, 542 F. 2d 1076, *cert. den'd* 97 S. Ct. 1571.

would "be destructive of" the Constitutionally protected right to petition and the strong public policy encouraging free, uninhibited access to governmental tribunals (*California Motor Transport Co.*, 404 U.S. at 510).

The erroneous decision below, if left as a binding determination, would frustrate that policy in areas well beyond labor relations. For that decision would deter any party desiring in good faith to invoke the orderly machinery of adjudication for the determination and enforcement of disputed claims. That decision is thus incompatible not only with the *Noerr-Pennington* doctrine but also with basic purposes behind the rule of law: that disputants should be encouraged to utilize judicial machinery rather than self-help or economic coercion for resolving disputes over the validity of their agreements, and that decisions of lawful tribunals sought and secured in good faith should be obeyed and may be relied upon as long as they are outstanding, without either monetary or penal liability for the consequences of such decisions.

The decision below would have especially pernicious consequences in the context of labor relations. The national policy, reflected in the decisions of this Court, favors resort by labor unions to arbitral and related judicial procedures, rather than the strike and the picket line, in order to resolve issues arising under a collective bargaining agreement. *E.g., United Steelworkers of America* v. *Warrier & Gulf Nav. Co.*, 363 U.S. 574; *Boys Markets, Inc.* v. *Retail Clerks, Local 770*, 398 U.S. 235. NMU's course of conduct in this case conformed to that policy. Yet the decision below, solely because of NMU's successful resort to arbitration and litigation, would expose this union to massive potential treble damage liability. The implications of that decision to labor organizations and others run counter to the national policy favoring resort to the orderly processes

of adjudication. These implications, we submit, should be clearly dispelled by this Court.

That the NMU's invocation of arbitral and judicial proceedings represented a good faith effort to enforce what was manifestly a substantial claim is demonstrated by Judge Frankel's decision and opinion, the initial decision of the NLRB's Administrative Law Judge, and the repeated comments of the Court of Appeals in the Section 8(e) case as to the complexity and closeness of the issues. Moreover, Sherman Act standards are far from precise, and the uncertainties are compounded when antitrust and labor relations law intersect, particularly when a challenged restraint is incorporated in a collective bargaining agreement. See *Connell Construction Co.* v. *Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616, 625-626. These difficulties underscore the importance of fostering recourse to orderly adjudication, rather than coercive self-help, for the resolution of disputes regarding the validity of collective bargaining provisions challenged under the Sherman Act.[8]

In a case involving a transfer clause, similar to the one at bar, this Court, indeed, indicated that recourse to the courts for injunctive relief is appropriate. In *Howard Johnson Co. Inc.* v. *Hotel & Restaurant Employees,* 417

[8] This policy is not limited to labor cases. Thus in the extensive antitrust area governed by the rule of reason (see *Continental T.V. Inc.* v. *GTE Sylvania, Inc.,* 97 S.Ct. 2549), it is often difficult to distinguish the licit from the illicit or to predict the ultimate judicial response. Parties involved in that area should be encouraged to present their genuine disputes for judicial resolution; and if a challenged restraint has not been implemented prior to a judicial determination, a litigant should not be subject to the treble damage provisions of the antitrust laws solely because of the consequences of a judicial decision obtained in good faith but subsequently reversed. See *Adolph Coors Company* v. *A&S Wholesalers, Inc., supra.*

U.S. 249, this Court ruled that such a clause did not obligate a purchaser to accept the seller's collective agreement or arbitrate the union's claims thereunder. The Court noted, however, that the union retained its arbitral remedy against the seller for breach of his obligations under the successorship provisions of the agreement. It also noted, in footnote 3 of its opinion, the union's failure to pursue another potential remedy, namely, seeking to enjoin the sale before it occurred, and cited the instant case. Although this footnote reflected the reversal of Judge Frankel's preliminary injunction, the Court indicated that a proceeding to enjoin breach of a contract provision similar to the NMU sale and transfer clause would be appropriate.

The *Noerr-Pennington* principle protects such good faith recourse to the machinery of adjudication. By exposing successful suitors to treble damages under the antitrust laws for the consequences of judicial decrees, the decision below aggravates its basic conflict with the *Noerr-Pennington* doctrine, escalates its infringement on Constitutional rights of petition, and compromises the purposes of the rule of law.

II.

The Decision Below Directly Conflicts With a Recent Decision of the Court of Appeals for the Tenth Circuit.

The *Noerr-Pennington* principle has recently been applied by the Court of Appeals for the Tenth Circuit as the basis for dismissing a treble damage claim in a situation strikingly similar to that herein. See *Adolph Coors Company* v. *A & S Wholesalers, Inc., supra.* In *Coors,* the plaintiff manufacturer obtained a preliminary injunction enforcing distribution limitations that it had imposed on its customers and barring A & S from obtaining and trans-

porting plaintiff's beer in violation of those limitations. A&S counterclaimed, alleging that the limitations violated the Sherman Act and seeking damages resulting from Coors' prosecution of the injunction proceeding. The district court dissolved the preliminary injunction but dismissed that counterclaim. In all material respects *Coors* is indistinguishable from the instant case.

The Court of Appeals, relying on this Court's recent decision in *Continental T.V., Inc., et al.* v. *GTE Sylvania, Inc., supra,* held that the validity under the Sherman Act of Coors' commercial restraint could be decided only after a trial governed by the "rule of reason", and remanded for that purpose. Nevertheless, after determining that Coors' injunctive action had not been a "sham," the Court of Appeals held that Coors' successful "pursuit" of that litigation could not give rise to recoverable damages. Accordingly, the reviewing court affirmed the trial court's dismissal of the damage claim based on Coors' resort to the courts.

The decision of the Tenth Circuit manifestly rests on the following rule: In the absence of circumstances activating the sham exception to *Noerr-Pennington,* there is no liability for damages flowing from the institution and *outcome* of legal proceedings initiated in good faith in order to enforce restrictions on sales even though such restrictions may ultimately be held to be in violation of the Sherman Act.[9] Plainly, that holding of the Court of Ap-

[9] In a case decided before *Pennington* and *California Motor Transport Co.*, plaintiff sought antitrust damages for injuries resulting from both a preliminary injunction and a permanent injunction subsequently dissolved on appeal. Although the injunctions enforced a trade restraint challenged as violative of the Sherman Act, the District Court granted summary judgment holding: "Injuries resulting from compliance with an injunction, even if improperly obtained, cannot support a recovery in a private antitrust suit." *Fiumara* v. *Texaco, Inc.*, 204 F. Supp. 344, 547; *aff'd per curiam*, 310 F. 2d 737 (3rd Cir.), *cert. den'd*, 372 U.S. 976.

peals for the Tenth Circuit is in direct conflict with the decision below. This direct conflict between circuits on an issue that lies at the heart of the rule of law would alone warrant the grant of this petition.

III.

The Justifications Advanced by the Court Below for Failing to Apply the *Noerr-Pennington* Doctrine Will Not Withstand Scrutiny.

1. Initially, the Court of Appeals erred in regarding the issue of Sherman Act liability for damages caused by a court decision as an aspect of the injunction bond rule (12a-13a). Although in this litigation the claimed damages happened to result from a preliminary injunction, the same issue would arise if damages flowed from a permanent injunction, or a judgment for money damages, unaccompanied by any injunction bond. In those hypothetical instances, if the decision enforcing a provision challenged under the Sherman Act were subsequently reversed on appeal, the *Noerr-Pennington* principle would still control and would bar subsequent recovery for the damages caused by the judicial decision.

2. In holding that "the execution of the disputed clause and the NMU's determined efforts to enforce it" were the proximate cause of injury, the Court below failed to distinguish between "efforts to enforce" through voluntary persuasion, economic coercion, or other extra-legal means and "efforts to enforce" through good faith legal proceedings. Such proceedings are privileged and non-actionable

under the *Noerr-Pennington* doctrine and may not, therefore, serve as the basis for a damage recovery.

The Court below noted that the sale and transfer clause, if independently violative of the Sherman Act, would be vulnerable to legal attack, regardless of any enforcement action by NMU. That point is sound as far as it goes. But under the District Court's findings—undisturbed by the Court of Appeals—the contract clause was totally ignored by Commerce; no damages flowed from its presence in the collective bargaining agreement. Had either Commerce or Vantage directed a legal challenge at the disputed clause before the NMU instituted its own arbitral and judicial proceedings, damages, as distinguished from injunctive or declaratory relief, would not have been recoverable.

Contrary to the assumption of the Court below, the *Noerr-Pennington* principles are not restricted to understandings and conspiracies whose only purpose is to seek official action. This Court has made it abundantly clear that those principles apply even though recourse to official action is an integral part of a scheme that includes independently illegal and actionable conduct. In such circumstances, unlawful conduct may be remedied and damages recovered for any resultant injuries, except for injuries caused by appeal to governmental action. Invoking official processes remains, however, non-actionable, and damages resulting from governmental decisions are not recoverable. Indeed, *Pennington* itself illustrates this point.[10]

[10] In *Pennington*, this Court held that an alleged union-employer agreement to eliminate marginal companies by having the union impose onerous bargaining terms on them would not be exempt from the Sherman Act and could lead to damage recovery, but that successful requests to the Secretary of Labor for certain Walsh-Healy Act determinations—and their consequences—did not extend either liability or damages, although part of the same conspiracy. Justice White's opinion stated (381 U.S. at 670-671):

> "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal either standing alone *or as part of a broader scheme itself violative of the Sherman Act.*"
>
> . . . . .
>
> "[T]he jury should have been instructed, as UMW requested, to exclude any damages which Phillips may have suffered as a result of the Secretary's Walsh-Healy determinations" (emphasis supplied).

Similarly, in the present case, the District Court was correct in excluding any damages that Commerce and Vantage may have suffered as a result of the District Court's preliminary injunction. And as was found by the trial court, there are no other damages.

3. In its repeated assertions that the NMU's resort to judicial proceedings did not "insulate" or "immunize" it from liability, or "bar" an action by Commerce and Vantage addressed to the validity of the "sale and transfer" provision, the Court below set up a straw man. Commerce and Vantage could have brought suit at any time; but because NMU refrained from self-help, absent the preliminary injunction they would not have been damaged and they would have been restricted to declaratory or injunctive relief. Plaintiffs' claim for such relief was not extinguished by the injunction obtained by NMU. On the other hand, their claim has not thereby been expanded, with respect to either liability or damages, by NMU's "petition" for judicial relief. Petitioner's contentions do not "insulate" or "immunize" NMU; the union's liability remains exactly what it was before it brought suit.

4. The Court of Appeals' analysis of proximate and supervening causes simply ignores *Noerr* and *Pennington*. Adopting the terminology of the opinion below, one could as accurately say in *Pennington* that the underlying illicit agreement to drive smaller coal companies out of business was a "material cause" or "substantial factor" in the defendants' approaches to the Secretary of Labor and that the damages resulting from the Secretary's Walsh-Healy

determinations were thus proximately caused by the illegal understanding between the union and the larger companies. But this Court in its *Pennington* decision rejected such an approach.[11]

The critical point overlooked by the Court below is that this case does not present a routine tort or even Sherman Act situation in which the interplay of the acts of a number of different private parties creates more than one "but for" cause. Here the key act which generated all the damages was the good faith and successful invocation of arbitral and judicial processes. That appeal to official action is constitutionally protected in order to safeguard free access to the courts among other branches of government. The vindication of that important policy and its underlying Constitutional basis requires review and reversal of the decision below.

[11] In *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, this Court remanded a key portion of a plaintiff's judgment for consideration of the applicability of the intervening decision in *California Motor Transport Co.* In *Otter* the defendant was guilty of attempts to monopolize which were independent of any resort to litigation and which were "a material cause" of the recourse to judicial proceedings and the resultant damages. Nevertheless, this Court indicated that the case would be governed by the *Noerr-Pennington* doctrine, as extended to judicial proceedings by *California Motor Transport Co.*, unless the "sham" exception was operative.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

(Opinion of Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 179-80—September Term, 1976.

(Argued January 19, 1977 Decided April 15, 1977.)

Docket Nos. 76-7217, 7223

COMMERCE TANKERS CORPORATION,

Defendant-Counterclaimant-Appellant,

—and—

VANTAGE STEAMSHIP CORPORATION,

Intervening Defendant-Appellant,

—against—

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff-Appellee.

VANTAGE STEAMSHIP CORPORATION,

Plaintiff-Appellant,

—against—

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Defendant-Appellee.

Appendix A

Before:

LUMBARD, FEINBERG, *Circuit Judges,* and
COFFRIN, *District Judge.**

Appeal from judgment of the United States District Court for the Southern District of New York, Thomas P. Griesa, *J.*, dismissing complaint alleging violations of federal antitrust and labor laws, and limiting recovery for wrongful injunction to amount posted for injunction bond.

Affirmed in part and reversed in part.

D. DAVID COHEN, Great Neck, N.Y., *for Defendant-Counterclaimant-Appellant.*

MARTIN C. SEHAM, New York, N.Y. (Surrey, Karasik, Morse and Seham; Fred C. Klein, David F. Devine, on the brief), *for Intervening Defendant-Appellant Vantage Steamship Corporation.*

CHARLES SOVEL, New York, N.Y. (Phillips & Cappiello), *for Plaintiff-Appellee.*

FEINBERG, *Circuit Judge:*

Over six years ago, appellant Commerce Tankers Corporation for pressing economic reasons attempted to sell its last remaining vessel to Vantage Steamship Corp., also appellant here. Appellee National Maritime Union (NMU), which represented the seamen on the vessel, objected to

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* Of the United States District Court for the District of Vermont, sitting by designation.

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the sale because Commerce had not obtained a commitment from Vantage to continue the NMU as bargaining representative, in accordance with a provision of NMU's collective bargaining agreement with Commerce. This began a flurry of litigation over a period of several years among Commerce, Vantage, NMU and the National Labor Relations Board (NLRB), in combinations and permutations set forth below.

At first NMU blocked the sale, obtaining an arbitration award and an injunction in the United States District Court for the Southern District of New York. *National Maritime Union* v. *Commerce Tankers Corp.*, 325 F. Supp. 360 (S.D.N.Y. 1971). That injunction, however, was reversed after the Regional Director of the NLRB, on an application under § 10(1) of the National Labor Relations Act, alleged that there was "reasonable cause to believe" that the clause invoked by the NMU violated section 8(e) of the National Labor Relations Act, see *McLeod* v. *National Maritime Union,* 457 F.2d 1127 (2d Cir. 1972), a preliminary determination later confirmed by the Board and by this court in *NLRB* v. *National Maritime Union,* 486 F.2d 907 (2d Cir. 1973), cert. denied, 416 U.S. 970 (1974). Commerce and Vantage claimed that they suffered damages of $1,550,000 and $2,230,000, respectively, due to NMU's conduct, which they alleged violated not only the National Labor Relations Act, but also the Sherman Act.[1] After a non-jury trial in the United States District Court for the Southern District of New York, Judge Thomas P. Griesa found that the proximate cause of any damage was the district court injunction against the sale. The judge

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[1] Appellants also alleged, inter alia, violation of the New York antitrust law, wrongful injunction, and tortious interference with contract. Only the second of these claims is pressed here.

therefore limited Commerce's recovery to the $10,000 injunction bond posted by NMU in the litigation below and denied Vantage any relief whatever, since it was not covered by the bond. 411 F. Supp. at 1225. This appeal followed. For reasons set forth below, we reverse and remand for further consideration of appellants' claim under the Sherman Act.

I

The background of this litigation is set forth in our two prior opinions cited above, and we will try not to repeat here anything but the essential facts. The contract clause in question, which is reproduced in the margin,[2] was con-

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[2] Article I, section 2, which is entitled "Sale and Transfer of Vessels," provides:

> (a) The Company agrees with respect to any vessel which is presently under or may hereafter come under this Agreement, that if during the term of this Agreement said vessel is sold or transferred in any manner to any other business entity not covered by this Agreement for operation under United States flag (but not including a vessel which the Company bareboat charters and the charter is terminated), said vessel shall be sold or transferred with the complement of employees who either are or shall be provided by the Union in accordance with the terms of this Agreement, or such number as may be agreed upon between the Union and the transferee. The term "transfer" shall be construed to include any chartering of a vessel by the Company.
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> (b) The Company obligates itself to obtain for the benefit of the Union a written undertaking with the Union to be executed by the business entity to which the vessel has been sold or transferred that for the full term of the Agreement all of its terms and provisions shall apply to said vessel except as herein-above provided and that said business entity will fully comply with all of the terms and provisions of this Agreement and any amendments thereto to preserve the jobs and job rights of the Unlicensed Personnel covered by this Agreement and to protect and maintain the wages, pension rights and other economic benefits and working conditions provided such personnel under this Agreement.

tained in a multiemployer NMU collective bargaining agreement, to which Commerce was a party. The clause provided in substance that if Commerce sells a ship to an American flag shipper not already under contract with the NMU, the ship will be sold with a crew provided by the NMU, and Commerce will obtain from the purchaser "a written undertaking" to abide by the NMU contract. In the fall of 1970, Commerce's parent, Vernitron Corporation, decided for business reasons to go out of the shipping business. On December 23, 1970, Commerce contracted to sell the S.S. Barbara, an ocean-going tanker, to Vantage for a price of $2,750,000, with delivery scheduled for February 28, 1971. The contract did not contain any provision regarding "the complement of employees" to be furnished by the NMU; nor did Commerce obtain from Vantage the undertaking with the NMU called for by paragraph (b) of the restraint-on-transfer clause. See note 2, supra. At the time, Vantage could not properly have given such an undertaking, since it was party to a conflicting agreement with the Seafarers International Union of North America (SIU), a rival maritime union. In January 1971, Vantage chartered the ship it had contracted to purchase to the Standard Oil Company of California (SoCal) for a period of one year, commencing on March 5, 1971.

At this point, furious activity ensued. The NMU demanded of Commerce and Vantage that Vantage accept the NMU as the bargaining agent of the unlicensed seamen employed aboard the ship. The SIU threatened to strike all Vantage vessels if it ceased using the SIU hiring hall to obtain its unlicensed seamen. Vantage threatened to sue Commerce if it did not deliver the S.S. Barbara in accordance with its contract. The NMU commenced and won a

labor arbitration, at which the arbitrator did not consider the legality of the restraint-on-transfer clause; the award enjoined the sale of the vessel without compliance with the clause. The next day, NMU began an action against Commerce in the United States District Court for the Southern District of New York for confirmation of the award. A week later, Vantage intervened as a party defendant and also filed unfair labor practice charges with the NLRB against the NMU and Commerce. After some other skirmishing, Judge Frankel in early March 1971 granted a preliminary injunction against the sale unless the contested clause were observed. The arguments of Commerce and Vantage that the clause was illegal were given short shrift, *National Maritime Union* v. *Commerce Tankers Corporation,* supra, 325 F. Supp. at 364-65, and the court required NMU to post only a $10,000 bond. Both Commerce and Vantage appealed.

At about this time, Vantage's charter with SoCal was cancelled due to "union problems." Shortly thereafter, Commerce advised the NMU that all efforts to obtain a United States flag purchaser had been unsuccessful and Commerce asked the NMU to drop its objection to the transfer, offering to drop its legal attack on the clause. The NMU refused, saying that it "would not gamble that the ship might go SIU."

In late May 1971, the Regional Director of the NLRB issued a complaint against the NMU and sought a § 10(1) injunction against enforcement of the restraint-on-transfer clause. The NLRB's motion was heard along with a motion by Commerce to vacate the earlier preliminary injunction against it, in view of the intervening NLRB complaint. In July 1971, Judge Croake denied both motions, but it appears that were it not for the jurisdictional problem posed by the earlier appeal of Commerce and Vantage, the judge would have vacated the injunction obtained by the NMU.[3] The NLRB appealed from the order refusing a § 10(1) injunction.

By notice of motion dated July 21, 1971, Commerce moved in this court to vacate the NMU injunction against the sale of the vessel, or, in the alternative, to increase the bond to be posted by the NMU to $2,750,000. Commerce advised the panel then sitting of the NLRB complaint and of various additional financial exigencies[4] and argued strenuously that at least the NMU "should be obliged to post a bond to cover the full purchase price of the vessel so that Commerce . . . . will not be left in a situation in which recovery against any of the other parties cannot be readily accomplished." The NMU's position was that a large bond was "singularly inappropriate . . . in view of the absence of any meaningful defense to the merits of the action [by the NMU against Commerce]." The panel denied Commerce's motion, but expedited the appeal. Thereafter, another panel reversed the rulings of the district court, vacating the NMU injunction and granting the NLRB a § 10(1) injunction. 457 F.2d 1127. Eventu-

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[3] *McLeod* v. *National Maritime Union,* 329 F. Supp. 151, 160 (S.D.N.Y. 1971). Judge Croake's original opinion vacated the preliminary injunction. The judge thereafter decided, however, that since the issue was the subject of a pending appeal, he should not, as a matter of discretion, express any opinion on the subject. The opinion was revised accordingly.

[4] Thus, the affidavits in support of the motion pointed out that Commerce had been directed by an arbitration award that it had obtained against Vantage, see 486 F.2d at 910 and n.3, to sell the S.S. Barbara in order to minimize damages, that the only outstanding offer at the time was $1,300,000 from a foreign flag operator, and that Vantage said it was still willing to buy the ship for $2,750,000 if it had the "express right to operate SIU."

ally, the NLRB completed the unfair labor practice proceeding and found that the NMU had violated § 8(e) of the Labor Act. The NLRB sought enforcement of its order, which we granted. 486 F.2d 907.

II

This background brings us to the litigation now before us. From the start, Commerce—later joined by Vantage—has claimed that the NMU's restraint-on-transfer clause was illegal and should not be enforced, and that the NMU was liable to it for damages. Commerce's damage claims were pressed in the form of counterclaims in the suit by NMU against it. Vantage brought its own action in October 1972 against the NMU and Commerce. In June 1973, pursuant to a settlement agreement between Vantage, Commerce and Vernitron, the action was discontinued against Commerce and Vernitron. After our reversal of the injunction obtained by the NMU in its action, Commerce's counterclaims against the NMU in that suit and Vantage's action against the NMU were consolidated and tried without a jury before Judge Thomas P. Griesa. The trial lasted over two weeks; 15 witnesses testified and there were over 1500 pages of transcript.

Commerce and Vantage argued that the NMU was liable for damages on a number of theories. First, the NMU violated Section 1 of the Sherman Act, 15 U.S.C. § 1, in two ways described by the district judge as follows: "(1) That the restraint on transfer clause involved a group boycott against certain potential purchasers of vessels and therefore constituted a *per se* violation; and (2) that the sale and transfer clause was the result of a combination or conspiracy between NMU and large shipping companies to enhance their competitive and financial position at the

expense of smaller companies such as Commerce." 411 F. Supp. at 1229. Second, the NMU was liable under section 303 of the Labor Management Relations Act, 29 U.S.C. § 187, which by its terms incorporates section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4), both of which are reproduced in the margin.[5] Third, Com-

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[5] Section 187 reads:

> (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.
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> (b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

Section 185(b)(4) reads:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
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> . . .
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> (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
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> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;
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> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative

merce and Vantage relied on various other alleged bases of liability: The contract clause violated New York General Business Law, § 340, known as the Donnelly Anti-trust Act; the NMU wrongfully induced breach of the contract between Commerce and Vantage for the sale of the S.S. Barbara; and the NMU obtained a "wrongful injunction."

Judge Griesa decided all of these claims on the merits except the very first of the two federal antitrust claims. On the second antitrust claim, the judge held in a lengthy opinion that the evidence did not support the view that the restraint-on-transfer clause was the result of a "conspiracy between the NMU and large shipping companies to enhance their competitive . . . position at the expense of smaller companies . . . ." The judge also ruled that even though the clause violated section 8(e) of the Labor Act, the NMU was not liable under 29 U.S.C. §§ 158(b)(4) and 187. The former section provides that it shall be an unfair labor practice for a labor union "to threaten, coerce, or restrain any person" with "an object" of "forcing or requiring any employer" to enter into a prohibited agreement or "forcing or requiring any person . . . to cease doing business . . ." with anyone else. The judge held that the NMU did not coerce Commerce into signing the agreement containing the restraint-on-transfer clause. Nor did the NMU coerce Commerce into maintaining the clause,

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of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . .

The "subsection (e)" referred to above is the same section 8(e) which the NLRB and then this court found that the NMU had violated by the restraint-on-transfer clause. 486 F.2d 907.

since the NMU did not "strike or threaten to strike" to enforce the provision, but instead "went to arbitration and then to court, . . . [and] resort to a court for a judicial remedy is not coercion." 411 F. Supp. at 1238. Accordingly, the judge found that the NMU did not violate section 8(b)(4) of the Labor Act and therefore appellants could not recover under 29 U.S.C. § 187. With regard to the other asserted theories of liability, the judge held that the New York State antitrust law was inapplicable, on the authority of *Connell Construction Co.* v. *Plumbers and Steamfitters Union No. 100*, 421 U.S. 616, 635-37 (1975), that the NMU was not liable for wrongful inducement of breach of contract because "the proximate cause of the asserted injuries was the preliminary injunction, and the remedy of Commerce and Vantage is limited to the injunction bond," 411 F. Supp at 1240, and that the NMU's liability for the "wrongful injunction" was limited to the $10,000 bond posted for the benefit of Commerce only.[6]

The only claim that the judge did not decide on the merits was that "the restraint-on-transfer clause was a group boycott against certain potential purchasers of vessels and therefore constituted a per se violation" of the Sherman Act. 411 F. Supp. at 1229. Judge Griesa recognized that this claim raised the preliminary issue whether the clause could be considered exempt from the antitrust laws after the Supreme Court decision in *Connell*, supra. But he decided that it was not necessary to reach that issue, because even if the clause were subject to the antitrust laws and did violate them, the violation would not be "the proximate cause" of the injuries to Commerce and Vantage. The judge found instead that:

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[6] Perhaps through oversight, the bond did not cover Vantage.

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> The proximate cause of the delay and final frustration of the S.S. Barbara transactions was the preliminary injunction issued by Judge Frankel in a case admittedly involving close and difficult questions of law. The problem created by the injunction was compounded by the long delay of Commerce and Vantage in seeking an appellate remedy.

411 F. Supp. at 1239. Accordingly, the judge denied recovery "on any theory of antitrust violation." Id.

III

Judge Griesa cited no authority for the view that one who commits a per se violation of the Sherman Act can be insulated from liability by the injunction bond rule. That rule has its origin in early equity practice. The chancellor had limited authority to award damages directly, but had broad discretion to frame orders granting injunctions. See generally 1 J. Pomeroy's Equity Jurisprudence §§ 1-39, 237(e) (5th ed. 1941). The practice grew up of conditioning the grant of a preliminary injunction on a plaintiff's agreement to post a bond to cover any damages that might result if it were later determined that plaintiff was not entitled to an injunction. See *Russell* v. *Farley*, 105 U.S. 433 (1881). The plaintiff, in effect, consented to liability up to the amount of the bond, as the price for it. Otherwise, plaintiff could be found liable for damages only on the theory of malicious prosecution, an action at law. See *Benz* v. *Compania Naviera Hildago*, 205 F.2d 945, 948 (9th Cir. 1953); 7 Moore's Federal Practice ¶ 65.10[1] at 65.98-99.

We recognize the authority of the injunction bond rule, and we have relied on it ourselves. E.g., *In re Spencer Kellogg & Sons*, 52 F.2d 129, 134-35 (2d Cir. 1931). But we do not think it applies to the antitrust claim pressed on the unique facts of this case. The purpose of the injunction bond rule is to provide protection to a defendant who is under injunction in an equity action, but who ultimately prevails on the merits. The rule, however, does not apply to this action at law for damages arising out of a per se antitrust violation. Had Commerce and Vantage brought their actions before the NMU's suit to enforce the restraint-on-transfer clause, their recovery would not have been barred by the intervening wrongful injunction, nor would their damages have been limited to the amount of the bond. We do not believe that their rights are altered because Commerce asserted its antitrust claims as counterclaims in the suit against it, or because Vantage intervened as a defendant in that action and brought its own action for damages after the NMU obtained its wrongful injunction.

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The NMU argues that it cannot be held liable even if its restraint-on-transfer clause violated the antitrust laws because the district court injunction was a "superseding cause" and because good faith resort to the courts cannot be a basis for liability, citing, e.g., *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America* v. *Pennington*, 381 U.S. 657, 669-70 (1965); and *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510-11 (1972). But those cases do not stand for the proposition that a group boycott that is illegal under the antitrust laws can be immunized from liability by a later law suit to enforce it. Indeed, the language in them indicates to the contrary.[7]

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[7] Petitioners, of course, have the right of access to the agencies and courts to be heard . . . . That right, as indicated, is part of the right of petition protected by the First Amendment. Yet

It appears that the district judge was led astray by applying the wrong standard for proof of damages in antitrust cases. Proximate cause for an antitrust violation is based on the statutory requirement that the injuries occur "by reason of" the antitrust violation. 15 U.S.C. § 15. We have described the test as

> a causal connection between an antitrust violation and an injury sufficient for the trier of fact to establish that the violation was a "material cause" of or a "substantial factor" in the occurrence of the damage.

Billy Baxter, Inc. v. *Coca-Cola Company,* 431 F.2d 183, 187 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971) (citations omitted). By this standard, the execution of the disputed clause and the NMU's determined efforts to enforce it were the proximate cause of injury to appellants, and the notion of superseding cause urged on us by the NMU on appeal is simply inapplicable. Similarly, we have emphasized that the right to recovery under the antitrust laws is given to those in the "target area" of the violation. *SCM Corp.* v. *Radio Corporation of America,* 407 F.2d 166, 171 (2d Cir.), cert. denied, 395 U.S. 943 (1969); *Calderone Enterprises Corp.* v. *United Artists Theater Circuit, Inc.,* 454 F.2d 1292 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972). Vantage, and other potential buyers of vessels, were the targets of the restraint-on-transfer clause.

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that does not necessarily give them immunity from the antitrust laws.

It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute. . . .

404 U.S. at 513-14. (Footnote omitted). See also 365 at 136-37.

Finally, we regard the district judge's emphasis on "the long delay of Commerce and Vantage in seeking an appellate remedy" as misplaced. Even if there had been an inexcusable delay, that would be irrelevant to NMU's antitrust liability under the tests referred to above. But even more important, there was no undue delay in seeking appellate relief in this unusual case. After the district court enjoined the sale in March 1971 and an appeal was taken to this court in early April, Commerce and Vantage frantically sought an immediate remedy at the NLRB by pressing the § 8(e) unfair labor practice charge. This was the most effective way of demonstrating that the district court injunction had been improper, and this course proved to be successful. Moreover, as soon as the NLRB issued its complaint on May 24, 1971, Commerce sought to vacate the injunction first in the district court and then in this court, and argued, in the alternative, for an increase in the NMU's bond. Under the circumstances, appellants followed a sensible course, and the NMU's efforts, successful at the time, to keep the injunction in force and the bond at an inadequate figure, strengthen rather than weaken, appellants' equitable position now.

We thus conclude that the district judge committed error in holding that no damages (above the $10,000 bond) could be proved on the claim of a group boycott antitrust violation and in failing to rule on the substance of that claim. The obvious remedy for that error is to remand the case to the district court for it to consider appellant's first antitrust claim on the merits. Appellants, however, ask us to bypass that procedure and to hold that the restraint-on-transfer clause would not be exempt from the antitrust laws under the standards established by *Connell,* supra, and that the agreement constitutes a group boycott

and is illegal per se under section 1 of the Sherman Act. See *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Both these assertions raise extremely complex and significant questions on the interaction between the federal labor and antitrust laws. The accommodation of the conflicting policies reflected in these laws has aptly been called "a troublesome and unruly issue." See Meltzer, Labor Unions, Collective Bargaining, and the Antitrust Laws, 32 U. Chi. L. Rev. 659 (1965). *Connell* indicates that a "nonstatutory" exemption from the antitrust laws in this case, see 421 C.S. at 622, turns upon whether the restraint-on-transfer clause was a "direct restraint on the business market . . . that would not follow naturally upon the elimination of competition over wages and working condition," id. at 625, and whether the inclusion of the clause in "a lawful collective-bargaining agreement" shelters the NMU because of the "federal policy favoring collective bargaining." Id. at 626. See generally St. Antoine, Connell: Antitrust Law at the Expense of Labor Law, 62 Va. L. Rev. 603 (1976); Note, Supreme Court Term—1974, 89 Harv. L. Rev. 234 (1975). And we do not believe that our prior holding that the clause violated § 8(e) necessarily determines that antitrust issue, although it lends support to appellants' position. And even if the "nonstatutory" exemption does not apply, there is at least a substantial question whether a per se approach under the antitrust laws is applicable in the case of a non-exempt labor activity.[8] See *Mackey* v. *National Football League*, 543 F.2d

[8] This brings us to the question of antitrust liability when union activity is held to be non-exempt. The principal danger of these recent rulings is that a finding of antitrust liability will automatically be made whenever the challenged conduct is held to be non-exempt. This would be a *per se* approach with a vengeance. Arrangements may fall outside the scope of mandatory bargaining and yet have no adverse effect on competition. We still must find whether the agreement restrains trade and whether the restraint is unreasonable. A fair reading of *Jewel Tea* [*Meat Cutters* v. *Jewel Tea Co., Inc.*, 381 U.S. 676 (1965).] satisfies me that the Court intended that there be a full-scale rule of reason inquiry in every instance in which a non-exempt activity is claimed to be in violation of antitrust.

Handler, Labor and Antitrust: A Bit of History, 40 Antitrust L.J. 233, 239-40 (1971). Cf. *Jacobi* v. *Bache & Co., Inc.*, 520 F.2d 1231, 1238-39 (2d Cir. 1975), cert. denied, 423 U.S. 1053 (1976).

606 (8th Cir. 1976), cert. filed, 45 U.S.L.W. 3511 (Jan. 25, 1977); see generally McCormick, Group Boycotts—Per Se or Not Per Se, That Is the Question, 7 Seton Hall L. Rev. 703 (1976) (on the complexity of the per se approach to group boycotts in general). It would, however, be inappropriate for us to decide these issues now without further findings from the district court and briefs on the questions from both parties.[9] See *Connell, supra,* 421 U.S. at 637. At this point, we are without detailed findings from the district court on the anti-competitive effects of the restraint-on-transfer clause, or in the event that the rule of reason inquiry should apply, on the anti-competitive purposes of the clause.[10] We therefore remand to the dis-

[9] On appeal, the NMU's brief did not discuss the antitrust claim at issue here, presumably because the district court did not reach it. Also, in their complaint and their briefs in this court, Commerce and Vantage have argued that the alleged group boycott was illegal per se. If, on remand, the district court determines that the rule of reason theory should apply, appellants should be allowed to press their claim of a group boycott antitrust violation under that theory.

[10] We realize that the district court has already determined that the restraint-on-transfer clause was not the result of a conspiracy between the NMU and the large shipping companies to enhance their competitive position. Our remand on the issue of an illegal group boycott does not disturb that finding, but by the same token, the finding does not foreclose full examination of appellants' group

trict court for consideration of the merits of the first antitrust claim.

IV

We turn now to the district court's dismissal of appellants' claim under § 303 of the Labor Management Relations Act, 29 U.S.C. § 187, see note 5, supra, and its limitation of NMU's liability for wrongful injunction to the amount of the injunction bond. With respect to the claim under § 303, we agree with the judge's determination that "resort to the courts" is not a threat, coercion or restraint under § 8(b)(4)(ii), 29 U.S.C. § 158(b)(4)(ii). See Retail Clerks Local 770 (Hughes Market, Inc.), 218 N.L.R.B. No. 84 (1975); cf. *Local Union No. 48* v. *Hardy Corp.*, 332 F.2d 682 (5th Cir. 1964). Similarly, the judge correctly limited Commerce's recovery for wrongful injunction to the $10,000 injunction bond posted by NMU. See *Associated General Contractors* v. *Illinois Conference of Teamsters*, 486 F.2d 972, 974-75 (7th Cir. 1973); *International Ladies Garment Workers Union* v. *Donnelly Garment Co.*, 147 F.2d 246 (8th Cir.), cert. denied, 325 U.S. 852 (1945); but see *United States Steel Corp.* v. *United Mine Workers*, 456 F.2d 483 (3d Cir.), cert. denied, 408 U.S. 923 (1972).

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boycott claim. We note that in *Connell*, "[t]here was no evidence that Local 100's organizing campaign was connected with any agreement with members of the multiemployer bargaining unit . . . ." 421 U.S. at 625 n.2. The Court nonetheless considered the multiemployer bargaining agreement as "relevant in determining the effect that the agreement between Local 100 and Connell would have on the business market." Id. at 623. The same considerations apply in this case. Although the district court found no conspiracy between the NMU and the large shipping companies to injure the smaller companies, it must still evaluate the agreement between the NMU and the shipping companies for its effect on the market.

Accordingly, we affirm the court's dismissal of appellants' claims under § 303 of the Labor Management Relations Act and its limitation on the recovery for wrongful injunction, but reverse its dismissal of appellants' claim of a group boycott in violation of section 1 of the Sherman Act and remand for further consideration.

LUMBARD, *Circuit Judge* (concurring in part and dissenting in part):

I agree with my brothers that any limitation of recovery under the injunction bond rule does not bar full recovery for violation of the antitrust laws.[1] But I disagree with my brothers' failure to find that there has been a violation of the antitrust laws since the record made in the court below furnishes ample basis for such a determination. In my view, it remains only for the district court to assess the damages and enter judgment.

Connell Construction Co. v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 634 (1975) squarely rejected the argument that § 303 of the LMRA provided the exclusive employer remedy for violations of the "hot cargo" prohibition of § 8(e) of the National Labor Relations Act ("NLRA"), 28 U.S.C. § 158(e). In determining whether to apply labor's nonstatutory exemption, the Court observed that "labor policy requires tolerance for

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[1] It seems to me there is considerable doubt of the continued validity of the limitation of recovery for wrongful injunction to the amount of the bond. See Metzger & Friedlander, The Preliminary Injunction: Injury Without Remedy? 29 Bus. Law. 913 (1974); Note, Interlocutory Injunctions and the Injunction Bond, 73 Harv. L. Rev. 333 (1959); and Note, Recovery of Damages on Injunction Bonds, 32 Colum. L. Rev. 869 (1932). However, as appropriate recovery should be available for violations of the antitrust laws, no purpose would be served by further examination of that question.

lessening of business competition based on differences in wages and working conditions[,]" 421 U.S. at 622, but an agreement between a union and a nonlabor party which restrains competition in any other manner is not immune, 421 U.S. at 622-23; see *Mine Workers* v. *Pennington*, 381 U.S. 657, 662 (1965); *Allen Bradley Co.* v. *Electrical Workers*, 325 U.S. 797, 806-11 (1945). In applying these standards to the facts before it, the *Connell* Court analyzed the agreement in issue in terms of § 8(e) of the NLRA. Although the union argued that the agreement was saved by reason of the construction industry proviso to § 8(e), the Court disagreed and found it to be an illegal secondary boycott.

Once the Court reached the § 8(e) issue it deemed it unnecessary to engage in further scrutiny but concluded that the union was not immunized from antitrust liability. 421 U.S. at 634-35. I believe that inasmuch as the National Labor Relations Board ("NLRB"), 196 NLRB No. 165 (1972), and this court, 486 F.2d 907 (2d Cir. 1973), cert. denied, 416 U.S. 970 (1974), have adjudicated the NMU restraint-on-transfer clause and efforts at its enforcement to be a violation of § 8(e), there is no need for us or for the district court to re-examine this record. See *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 483 F.2d 1154, 1179 (5th Cir. 1973), *rev'd*, 421 U.S. 616 (dissenting opinion of Circuit Judge Clark).

Implicit in our prior decision enforcing the Board's order was an acceptance of its finding that the restraint-of-transfer clause prevented Commerce from selling the S.S. Barbara to a Vantage, 486 F.2d at 911.[2] We also ruled

[2] The district court's opinion arrives at the same basic finding but for its legal conclusion which we today reject that the NMU's resort to arbitration and the ensuing injunction were nonactionable superseding causes. 411 F. Supp. at 1239.

that the *National Woodwork* standards were met since the clause was not "addressed to the labor relations of the contracting employer *vis-à-vis* his own employees," 486 F.2d 912, *quoting National Woodwork Mfgrs Ass'n* v. *NLRB*, 386 U.S. 612, 645 (1967). These two conclusions are sufficient to meet the *Connell* standard that the clause have "a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions." 416 U.S. at 635.[3]

The majority suggests that inclusion of the clause in "a lawful collective-bargaining agreement" might save it from antitrust scrutiny, at 801, *quoting Connell*, supra, 421 U.S. at 626. But that argument has no application to the facts before us since we have already ruled that portion of the collective-bargaining agreement to be unlawful as violative of § 8(e).

The record before us requires a finding of liability on either a per se or rule-of-reason analysis of the NMU's

[3] This view is fully consistent with the thoughts of Professor Handler whose comments are favorably cited by the majority:

> To me the test should be this: Whatever is required or expressly authorized under existing labor legislation should be exempt from the antitrust laws. And whatever is mandatory should be determined in the light of our national labor policy, which should override any countervailing antitrust considerations.

Handler, Labor and Antitrust: A Bit of History, 40 Antitrust L.J. 233, 238 (1971).

Perhaps a finding of no exemption entails a preliminary appraisal of the nature and merits of the underlying antitrust claim, but it does not necessarily follow that the labor organization will be found liable on that claim. "Exemption and liability are not co-extensive concepts." *Id.* at 237. The removal of the shroud of immunity simply means that the union must answer to the charge of violating the antitrust laws.

actions.[4] Under the per se approach a well-meaning purpose will not insulate a group boycott from liability, see *Fashion Originators Guild of America, Inc.* v. *FTC,* 312 U.S. 457 (1941); *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.,* 364 U.S. 656 (1961), and its anticompetitive effect will be presumed, see *Northern Pacific Railway* v. *United States,* 356 U.S. 1, 5 (1958).[5] Under the balancing approach of the rule of reason, examination of the facts of this case indicates that the anticompetitive effects of this particular agreement outweigh any legitimate collective bargaining concerns.

Judge Griesa's 58 page opinion carefully traced the bargaining practices in the shipping industry and found that the restraint-on-transfer clause had its genesis in complaints made by Joseph Curran, president of the NMU, in a January 22, 1968 letter to Edward Silver concerning the loss of NMU-represented vessels through sale and transfer. Silver, who testified at trial, was the lawyer and chief negotiator for the two major shipping owners associations, the Tankers Service Committee ("TSC") and the Maritime Service Committee ("MSC"). The restraint-on-transfer clause was first successfully negotiated into a collective-bargaining agreement by the Maritime Enginers Beneficial Association ("MEBA"), a non-competing union, in a May, 1968

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[4] In a post-*Connell* decision, the Eighth Circuit has found the per se approach to be inapplicable to a group boycott arising out of a labor agreement. See *Mackey* v. *National Football League,* 543 F.2d 606 (8th Cir. 1976), cert. filed, 45 U.S.L.W. 3511 (Jan. 25, 1977). A rule of reason inquiry in the context of a labor boycott might well be an appropriate means to balance the goals of the antitrust laws with the positive values of collective-bargaining.

[5] For a recent and thorough review of this subject see McCormick, Group Boycotts—Per Se or Not Per Se, That is the Question, 7 Seton Hall L. Rev. 703 (1976).

amendment to its contract with MSC. Judge Griesa found this version of the restraint-on-transfer clause to be the model for the NMU clause. The district judge found the purpose of the clause to have been memorialized in the following portion of a June 25, 1969 letter from J. M. Calhoon, president of MEBA to Silver:

> The original and continuing purpose of said Memorandum is: To preserve the jobs and job rights of the Company's engineers covered by our collective bargaining agreement and to protect and maintain the wages, pension rights and other economic benefits and working conditions provided such engineers under said Agreement.

411 F. Supp. 1224, 1233 (S.D.N.Y. 1976). The clause was subsequently adopted without significant discussion in the NMU's 1969 collective-bargaining agreement.

Allen Bradley Co., supra at 798, forecloses any argument that a labor agreement is not unreasonable simply because its general purpose is "to get and hold jobs for [the union members] at good wages and under high working standards." As we noted in our prior decision, the NMU's interest in job preservation was not directed at the crew members of the S.S. Barbara since it is the union's practice to strip a ship of its crew when it is sold and to have it remanned from the hiring halls. 486 F.2d at 914.

The anticompetitive effect of the restraint-on-transfer clause is also apparent from the record before us. Its most immediate impact was to thwart the sale of the S.S. Barbara to Vantage, cause the cancellation of the lucrative SoCal charter, and virtually force the sale of the vessel for scrap. Beyond that, the clause prohibits shipowners from selling their vessels to United States Flag operators unless

the prospective buyer agrees to enter into an NMU collective-bargaining agreement. Owners are effectively prevented from selling to a potential buyer whose employees are presently represented by the NMU's rival, the Seafarer's International Union ("SIU"). Sales are, therefore, limited to foreign flag operators, non-SIU operators, or those who would buy for scrap value. Mergers between small NMU represented owners and small SIU represented owners are foreclosed. By encouraging sales to foreign flag owners, the clause lessens competition among the American owners.

In summary, whether the appropriate inquiry is under a rule of reason or the per se measure, the record requires a finding that the Union must be held responsible for violation of the antitrust law.

I would hold that the NMU has violated § 1 of the Sherman Act, 15 U.S.C. § 1, and remand to the district court solely for determination of damages.

Appendix B

(Judgment of Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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71 Civ. 582 (T.P.G.)—72 Civ. 4619 (T.P.G.)
76-7217—76-7223

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of April one thousand nine hundred and seventy-seven.

Present:

HON. J. EDWARD LUMBARD,
HON. WILFRED FEINBERG,
Circuit Judges,

HON. ALBERT W. COFFRIN,
District Judge.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Plaintiff-Appellee,

v.

COMMERCE TANKERS CORPORATION,
Defendant-Counterclaimant-Appellant,

and

VANTAGE STEAMSHIP CORP.,
Intervening Defendant-Appellant.

Appendix B

VANTAGE STEAMSHIP CORP.,

Plaintiff-Appellant,

v.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in part, reversed in part and the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

By ARTHUR HELLER
Deputy Clerk

JUDGMENT ENTERED
6/29/77

RAYMOND F. BURGHARDT
CLERK

A true copy,
A. DANIEL FUSARO
FILED, APRIL 15, 1977
A. DANIEL FUSARO, CLERK

Appendix C

(Order of Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteenth day of June, one thousand nine hundred and seventy-seven.

76-7217

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff-Appellee,

v.

COMMERCE TANKERS CORPORATION,

Defendant-Counterclaimant-Appellant,

and

VANTAGE STEAMSHIP CORP.,

Intervening Defendant-Appellant.

VANTAGE STEAMSHIP CORP.,

Plaintiff-Appellant,

v.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Defendant-Appellee.

Appendix C

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellant Commerce Tankers Corporation, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
IRVING R. KAUFMAN,
Chief Judge

Appendix D

(Opinion of District Court)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Nos. 71 Civ. 582—72 Civ. 4619
March 31, 1976

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff,

v.

COMMERCE TANKERS CORPORATION,

Defendant-Counterclaimant,

and

VANTAGE STEAMSHIP CORP.,

Intervening Defendant.

VANTAGE STEAMSHIP CORP.,

Plaintiff,

v.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Defendant.

ABRAHAM E. FREEDMAN by Charles Sovel, Ned R. Phillips, New York City, *for National Maritime Union of America, AFL-CIO.*

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D. David Cohen, Great Neck, N.Y., Marshall, Bratter, Greene, Allison & Tucker by James M. Bergen, Stephen B. Camhi, New York York City, *for Commerce Tankers Corp.*

Surrey, Karasik, Morse & Seham by Fred C. Klein, Donald F. Devine, New York City, *for Vantage Steamship Corp.*

Griesa, *District Judge:*

This is the final stage of litigation in these two consolidated cases involving National Maritime Union of America ("NMU"), Commerce Tankers Corporation, and Vantage Steamship Corp. The remaining matters to be covered relate to the counterclaims of Commerce against NMU in 71 Civ. 582 and the claims of Vantage against NMU in 72 Civ. 4619. These matters have been tried by the court without a jury. This decision constitutes findings of fact and conclusions of law.

Prior Proceedings

This litigation grows out of an attempt by Commerce to sell its ship, the S.S. Barbara, to Vantage pursuant to a contract of sale dated December 23, 1970. The contract price was $2,750,000. At the time of this contract of sale, Commerce had a collective bargaining agreement with NMU covering the unlicensed personnel on Commerce's vessels. Article I, Section 2 of this collective bargaining agreement provided that if the employer sold any of its ships to a buyer who would operate under the United States flag, the ship should be sold with the complement of NMU employees, and that the employer would obtain

Appendix D

from the buyer an undertaking that the NMU collective bargaining agreement would apply to the vessel.[1] Article I, Section 2 will sometimes be referred to as the "restraint on transfer clause."

The problem created by the proposed sale of the S.S. Barbara to Vantage was that Vantage's collective bargain-

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[1] Article I, Section 2 reads as follows:

"Section 2. Sale and Transfer of Vessels. (a) The Company agrees with respect to any vessel which is presently under or may hereafter come under this Agreement, that if during the term of this Agreement said vessel is sold or transferred in any manner to any other business entity not covered by this Agreement for operation under United States flag (but not including a vessel which the Company bareboat charters and the charter is terminated), said vessel shall be sold or transferred with the complement of employees who either are or shall be provided by the Union in accordance with the terms of this Agreement, or such number as may be agreed upon between the Union and the transferee. The term 'transfer' shall be construed to include any chartering of a vessel by the Company.

"(b) The Company obligates itself to obtain for the benefit of the Union a written undertaking with the Union to be executed by the business entity to which the vessel has been sold or transferred that for the full term of the Agreement all of its terms and provisions shall apply to said vessel except as hereinabove provided and that said business entity will fully comply with all of the terms and provisions of this Agreement and any amendments thereto to preserve the jobs and job rights of the Unlicensed Personnel covered by this Agreement and to protect and maintain the wages, pension rights and other economic benefits and working conditions provided such personnel under this Agreement.

"(c) The Company agrees that if it desires to sell, bareboat charter or in any manner whatsoever transfer a vessel to another business entity, whether for United States flag or Foreign-flag registry, timely written notice to the Union must first be given prior to any such sale or transfer.

"(d) This Section shall be deemed of the essence of the Collective Bargaining Agreement and in the event of any violation, the no-strike provision of this Agreement shall not be applicable."

ing agreement for unlicensed seaman was with NMU's rival organization—Seafarer's International Union ("SIU"). Vantage did not intend to man the S.S. Barbara with NMU members, nor did Vantage give Commerce any undertaking that it would do so.

After learning of the proposed sale, NMU demanded enforcement of the restraint on transfer clause by way of arbitration, which was held before Arbitrator Theodore Kheel in New York City on February 8, 1971. The arbitrator found in favor of NMU and ordered that Commerce not transfer the S.S. Barbara to Vantage or any other purchaser without complying with the clause.

On February 9, 1971 the first of the actions in this court, 71 Civ. 582, was commenced by NMU against Commerce to obtain enforcement of Arbitrator Kheel's decision.

Vantage was thereafter permitted to intervene in this action. On March 2, 1971 Judge Frankel handed down a decision holding that a preliminary injunction should issue restraining the transfer of the S.S. Barbara in violation of the restraint on transfer clause. *National Maritime Union* v. *Commerce Tankers Corp.*, 325 F.Supp. 360 (S.D.N.Y. 1971). The preliminary injunction was signed March 4, 1971. NMU was required to post a bond of $10,000. Commerce and Vantage appealed.

On May 24, 1971 the New York Regional Director of the National Labor Relations Board issued a complaint against NMU charging that the restraint on transfer clause in the Commerce-NMU collective bargaining agreement violated Section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e). On the same day the NLRB filed a petition in this court (71 Civ. 2300) asking for a preliminary injunction under Section 10(*l*) of the National Labor Relations Act, 29 U.S.C. § 160(*l*). The NLRB filed an amended petition on June 1 adding Commerce as a respondent.

On May 27, Commerce filed a motion in the District Court to vacate Judge Frankel's preliminary injunction in view of the NLRB charges.

Both the NLRB's § 10(*l*) motion in 71 Civ. 2300 and Commerce's motion to vacate in 71 Civ. 582 were heard by Judge Croake on June 4, 1971. On July 15 Judge Croake issued a decision denying both motions. *McLeod* v. *National Maritime Union*, 329 F.Supp. 151 (S.D.N.Y. 1971). Appeals were taken.

On March 22, 1972 the Second Circuit Court of Appeals reversed the rulings of Judges Frankel and Croake, holding that there was reasonable cause to believe that Article I, Section 2 of the NMU-Commerce collective bargaining agreement involved an unfair labor practice and that therefore a Section 10(*l*) injunction should issue. The Court of Appeals also held that, because of the filing of the NLRB complaint subsequent to Judge Frankel's preliminary injunction, that injunction should be vacated. *National Maritime Union* v. *Commerce Tankers Corp.*, 457 F.2d 1127 (2d Cir. 1972).

Unfortunately, by this time the proposal to transfer the S.S. Barbara to Vantage was dead, for reasons to be described hereafter. On May 1, 1972 Commerce sold the Barbara to Plaza Shipping, Inc. (an NMU contract company) for a greatly reduced price—$700,000.

Meanwhile, the unfair labor practice matter had been proceeding in the NLRB. On September 2, 1971 NLRB Trial Examiner Thomas F. Ricci filed a decision recommending dismissal of the complaint. On May 16, 1972 the Board issued its decision, reversing the trial examiner, and holding that Article I, Section 2 of the NMU-Commerce agreement was invalid because it violated Section 8(e) of the National Labor Relations Act. Upon the

NLRB's petition for enforcement, in which Vantage intervened in support of the NLRB, the Court of Appeals (opinion of Judge Feinberg joined by Judges Lumbard and Friendly) upheld the NLRB's ruling. *NLRB* v. *National Maritime Union,* 486 F.2d 907 (2d Cir. 1973), *cert. denied,* 416 U.S. 970, 94 S.Ct. 1993, 40 L.Ed.2d 559 (1974).

It is appropriate here to discuss this decision in some detail. Section 8(e) provides:

> "(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: . . ."

The Court noted that Section 8(e) does not "shimmer with clarity" and that the question presented was "difficult to decide." *Id.* at 910, 911. The Court further noted that the primary purpose of Section 8(e) was to curb certain "secondary" labor activities. NMU argued that Article I, Section 2 was proper because it had the "primary" labor objective of preserving work for its members vis-a-vis Commerce and other NMU employers. However, the Court of Appeals held that the contractual clause went beyond "work preservation," and had an illegal secondary purpose of expanding NMU jurisdiction to non-NMU employers such as Vantage.

Concurrently with these proceedings in the federal courts and the NLRB, there was an arbitration and a state court proceeding involving Commerce and Vantage.

On February 10, 1971 Commerce demanded arbitration against Vantage on the December 23, 1970 contract of sale, claiming damages for breach of contract. On March 29, 1971, in an action in Supreme Court, New York County, Justice Streit ordered arbitration. The arbitration commenced May 12. On July 9, the arbitrators awarded Commerce damages measured by the amount of the contract price for the S.S. Barbara—$2,750,000, plus other damages in the amount of $133,264, less the net proceeds to be realized upon the resale of the S.S. Barbara.

As already described, Commerce sold the Barbara to Plaza Shipping, Inc. on May 1, 1972 for $700,000.

On November 20, 1972 Justice Abraham J. Gellinoff issued a decision confirming the arbitration award. This was affirmed by the Appellate Division, First Department, on April 5, 1973. *Vantage Steamship Corp.* v. *Commerce Tankers Corporation,* 41 A.D.2d 813, 342 N.Y.S.2d 281 (1st Dept. 1973).

On October 30, 1972 Vantage commenced an action in this court (72 Civ. 4619) against NMU and Commerce. Among other things, Vantage alleged that NMU and Commerce had been guilty of an unfair labor practice and had violated Section 1 of the Sherman Act. This is one of the cases being dealt with in the present opinion.

On May 31, 1973 Vantage and Commerce concluded a settlement of all disputes between these parties. Vantage agreed to pay Commerce $700,000 in installments over a period of time. Commerce and Vantage exchanged releases in which there were express reservations of rights against NMU.

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The net result of all these proceedings is that there remain for determination Commerce's claim against NMU for damages in 71 Civ. 582 and Vantage's claim against NMU for damages in 72 Civ. 4619.

Contentions of Commerce and Vantage

Commerce and Vantage claim that NMU is liable for damages under Section 303 of the Labor Management Relations Act, 29 U.S.C. § 187, which provides:

> "§ 187. Unlawful activities or conduct; right to sue; jurisdiction; limitations; damages
>
> "(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.
>
> "(b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controvery, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit." [2]

[2] Originally Commerce and Vantage contended that they would be entitled to damages under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. However, this section relates to suits "for violation of contracts between an employer and a labor organization." Neither Commerce nor Vantage is suing NMU on such a cause of action.

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Section 303 authorizes a suit for damages where there has been a violation of Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4). The relevant passages in Section 8(b)(4) are as follows:

> "(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> • • • • •
>
> "(4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> "(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;
>
> "(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . ."

The references to "subsection (e) of this section" is the Section 8(e) which was found to have been violated by the Court of Appeals in its opinion in the NLRB proceeding. 486 F.2d 907. As already described, that court held that Article I, Section 2 of the NMU-Commerce agreement was a violation of Section 8(e). However, the *mere making* of a contract which violates Section 8(e) does not in and of itself give rise to a cause of action *for damages*.

It is only where the *added* elements of Section 8(b)(4) are found to exist that a cause of action for damages accrues. For instance, the latter section would be violated

where a labor union *threatens, coerces* or *restrains* an employer with the object of *forcing* or *requiring* the employer to enter into the Section 8(e) agreement. Similarly, Section 8(b)(4) would be violated if a labor union threatens, coerces or restrains an employer in order to force or require him to cease doing business with another party.

Commerce and Vantage claim that NMU violated Section 8(b)(4) in that (1) NMU coerced Commerce into entering into the collective bargaining agreement containing the Article I, Section 2 provision which violated Section 8(e); (2) that NMU coerced Commerce, and forced Commerce to cease doing business with Vantage, and forced a prospective charterer to cease doing business with Vantage—such coercion and force being the strike threat contained in Article I, Section 2; (3) NMU restrained Commerce, and forced Commerce to cease doing business with Vantage, by obtaining the preliminary injunction from Judge Frankel.

Commerce and Vantage further contend that NMU is liable under Section 1 of the Sherman Act. In the first place, Commerce and Vantage urge that there is no labor law exemption from antitrust liability here, citing *Connell Construction Co.* v. *Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975). Vantage and Commerce then contend that NMU has Sherman Act Section 1 liability on the following related but somewhat different theories: (1) That the restraint on transfer clause involved a group boycott against certain potential purchasers of vessels and therefore constituted a *per se* violation; and (2) that the sale and transfer clause was the result of a combination or conspiracy between NMU and large shipping companies to enhance their competitive and financial position at the expense of smaller companies such as Commerce.

Commerce and Vantage also rely upon certain common law theories. They contend that NMU wrongfully induced the breach of the contract between Commerce and Vantage for the sale of the S.S. Barbara. Commerce and Vantage also contend that NMU is liable for obtaining a "wrongful injunction"—*i. e.*, the preliminary injunction issued by Judge Frankel.

Vantage claims that Article I, Section 2 violated New York General Business Law § 340, known as the Donnelly Anti-Trust Act.

The amounts of damages (before any trebling based upon the Sherman Act theory) are claimed to be as follows. Commerce claims that it is entitled to a total of $1,550,000, calculated by taking the contract price for the S.S. Barbara ($2,750,000) and subtracting the amount realized upon the resale to another purchaser ($700,000) and further subtracting the amount received from Vantage in the settlement ($700,000), giving a net total of $1,350,000, to which is added the costs of holding the S.S. Barbara after it was supposed to have been delivered to Vantage ($200,000). Vantage claims a total of $2,230,000, consisting of loss of profits on a charter it had for the S.S. Barbara with Standard Oil of California—the alleged profits being $1,500,000; amounts invested by Vantage in repair of the S.S. Barbara ($30,000); and the amount paid to Commerce in the settlement ($700,000).

Contentions of NMU

NMU denies the validity of each of the above theories. In addition NMU asserts certain affirmative contentions. NMU urges that the only action it took to enforce Article I, Section 2 was to obtain an arbitration award, and then sue in this court to enforce that award. NMU contends

that it was the preliminary injunction of Judge Frankel in this lawsuit which prevented the consummation of the sale of the S.S. Barbara to Vantage and the fulfillment of the charter which Vantage had obtained for the vessel. NMU argues that Commerce and Vantage did not pursue available remedies in the Court of Appeals in a timely or appropriate manner. NMU contends that its liability, if any, is limited to the amount of the $10,000 bond posted for the preliminary injunction.

NMU also urges that the settlement of the mutual claims of Commerce and Vantage operates as a bar to any recovery by either of these parties against NMU.

Further Facts

Background of Article I, Section 2

A substantial part of the evidence in this case relates to the contention of Commerce and Vantage that the restraint on transfer clause (Article I, Section 2) of the NMU-Commerce collective bargaining agreement was the result of a joint effort by larger shipping companies to somehow prejudice the smaller companies and reduce competition.

Commerce and Vantage contend that the large companies were attempting to inhibit free transfer of vessels so as to keep the contributors to the union pension funds "bound into the contributing group" (Commerce Post-Trial Brief p. 28). Moreover, Commerce and Vantage contend that the large companies were attempting to reduce competition in certain trade carried on by United States flag vessels.[3] Commerce and Vantage allege that, since Article I, Section 2 imposed its restrictions only upon sales to a United

[3] United States intercoastal trade and certain other trade has been limited by law to United States flag vessels.

States flag operator, the result would be to encourage sales to foreign flag operators thus reducing the number of United States flag vessels.

There is no direct evidence that these alleged purposes were discussed or agreed upon by the larger companies. Commerce and Vantage assert that their claims of combination or conspiracy on the part of the larger shipping companies are proved by circumstantial evidence about the background of the collective bargaining agreement in question, and about the methods used in negotiating this agreement.

In the United States maritime industry there are separate unions representing the unlicensed seamen, the engineers, the deck officers and the radiomen.

There are competing unions for the different categories of personnel—an example being the NMU and SIU rivalry respecting unlicensed seamen. In one segment of the United States shipping industry the companies have contracts with a particular line-up of unions, as follows:

Category	*Union*
Unlicensed seamen	NMU
Engineers	Marine Engineers Beneficial Association ("MEBA")
Deck officers	Masters, Mates and Pilots ("MMP")
Radiomen	American Radio Association ("ARA")

Among the shipping companies having contracts with this group of unions—NMU, MEBA, MMP and ARA—are companies who have formed certain committees to act together in bargaining with the unions. One such commit-

tee is the Tanker Service Committee ("TSC"), which represents certain large tanker operators. The other committee is the Maritime Service Committee ("MSC"), which represents certain non-tanker operators. For many years a lawyer by the name of Edward Silver has represented both the TSC and the MSC in negotiations with these unions.

Many companies other than members of the TSC and the MSC have collective bargaining agreements with this set of unions. These other companies have been referred to in this action as the "independents." Commerce was such an "independent" tanker company, operating two tankers. Although the independents are not represented by the TSC and MSC in any legal sense, the independents have in practice generally acquiesced in the agreements worked out by the committees.

In 1961 or thereabouts NMU, MEBA, MMP and ARA entered into labor contracts which were due to expire in June 1965. In 1963 NMU agreed with its contract employers that its agreement would be extended until June 1969, subject to possible "wage reopeners" in 1967 or 1968. NMU hoped that the other unions would follow, thus creating some degree of stability in maritime labor relations. However, this did not occur. When the non-NMU contracts expired in 1965, there was a strike by MEBA which shut down a large segment of the shipping industry. One of the problems was the contention that MEBA was not receiving benefits granted to MMP.

When the 1965 agreements with MEBA, MMP and ARA were arrived at, one of the features of these agreements was what are known as "most favored nation" clauses. These clauses provided basically that each union would receive the equivalent of the most favorable treatment given to another union. The 1965 agreements were to last until June 1969.

The NMU contract, having been entered into prior to 1965, did not have a most favored nation clause.

The most favored nation clauses proved to be highly unsatisfactory. An arbitration award in favor of one union would lead to an arbitration proceeding by another union claiming to be entitled to the benefits conferred upon the union in the first proceeding.

Moreover, during the 1965-1969 period serious questions arose regarding the funding of union pension plans. One problem related to what is called the "past service liability."

When the union pension funds were established (the NMU fund was established in 1951), the companies became liable for contributions, not only for benefits based upon current services of the employees, but also for benefits based upon past services—*i. e.*, services performed by employees prior to the adoption of the pension plan. By the late 1960's the companies as a whole were delinquent on their past service liabilities to the extent of many millions of dollars.

Subsequent to the conclusion of the 1965 labor contracts, the ARA obtained an arbitration award directing that the past service liability of the companies to the ARA pension plan should be made up in a short period of time—about five to seven years. This was a cause of severe consternation to the shipping companies. If the formula decided upon by the arbitrator with respect to the ARA were to be applied with respect to other union pension funds, the burden on the companies would be acute.

Lee Pressman, attorney for the MEBA, proposed a compromise. Under his proposal the funding of past service liabilities would be stretched out to either 15 or 25 years depending on the relative age of the vessels owned by a particular company. A company having vessels with an

average age of more than 20 years would fund its past service liability over a period of 15 years. A company having vessels with an average age of less than 20 years would fund the past service liability over a period of 25 years. It appears that in 1967 this proposal was agreed upon by the TSC and MSC and also by the group of unions —NMU, MEBA, MMP and ARA. The evidence is not precise as to whether the independent shipping companies agreed. The implication is that they acquiesced in their normal manner.

Obviously the companies able to stretch their past service funding over 25 years would have a somewhat lighter financial load than the companies required to do the funding in 15 years. Commerce and Vantage contend that this was one of the instances in which the larger shipping companies combined to place the smaller companies at an economic disadvantage. The idea is that the larger companies had the newer fleets and dealt themselves the more favorable funding treatment.

The weight of the evidence does not support this contention. For instance, United Fruit had a large fleet, but the age of the fleet was such as to put United Fruit in the shorter—15 year—funding category. Commerce itself appears to have been eligible to receive the benefit of the 25-year funding.

During this period, NMU and MEBA manifested concern about loss of jobs for their members due to discontinued operation of vessels or sale of vessels to companies not having contracts with these particular unions.

On January 22, 1968, Joseph Curran, president of NMU, wrote Silver complaining:

> "The shipowners have been engaged in the sale and transfer of vessels and the merger of companies at

> such a rapid rate that new transfer agreements go into effect before the ink on the old ones is dry."

The letter stated that this situation prevented "stability" in the industry and further stated that the union would take

> ". . . appropriate action to protect its contracts, the security of its pension programs, and the rights of our members and their families to receive the pension benefits which they have earned."

NMU took no immediate action. However, MEBA entered into discussions on the subject with Silver. The result was that in May 1968 MSC and MEBA agreed upon an amendment to their collective bargaining agreements in the form of a restraint on transfer clause of the kind which later became the Article I, Section 2 involved in this action. In other words the genesis of NMU's restraint on transfer clause was the MEBA-MSC contract amendment of May 1968.

In late 1968 and early 1969 the unions and the TSC and MSC were preparing for the collective bargaining negotiations which would take place in connection with the expiration of the NMU, MEBA, MMP and ARA contracts in June 1969.

The subject of funding the union pension plan was under further consideration. Funding of union pension plans was based upon contributions from the companies. An individual company would contribute on the basis of the number of man-days of employment with that company. If a company scrapped or sold vessels, or if it acquired more modern vessels requiring less crew, this company's man-days of employment would be reduced. The practice in the industry was to have periodic calculations by actu-

aries as to the amounts of money required to fund the union pension plans and the number of man-days being worked, and an assessment of the amount of money per man-day required to be contributed.

The unions were concerned about the solvency of their pension plans because of loss of employment—reduction in man-days—in the United States maritime industry. The problem related to the entire subject of funding, both past service and present service liabilities. The concern existed despite the fact that in theory, even if man-days were reduced, solvency of the funds could be insured by actuarial adjustments increasing the contribution per man-day.

During 1968 and early 1969 NMU, MEBA, MMP and ARA reached an agreement among themselves that they would present, as far as possible, common demands to the shipping companies in the forthcoming 1969 collective bargain negotiations. This was designed to avoid disputes which had been created by different unions obtaining different benefits. The common bargaining approach was also designed to do away with the most favored nation clauses, which were now condemned by both the companies and the unions.

One of the demands which the unions agreed to make upon the companies was for guaranteed minimum contributions to the union pension funds. It was also agreed that each of the unions would request the restraint on transfer clause which had been obtained by the MEBA from the MSC in May 1968.

The collective bargaining negotiations opened on April 2, 1969. It had been arranged that these negotiations would be held on a coordinated basis involving all of the unions—NMU, MEBA, MMP and ARA. At the opening session on April 2 representatives of all the unions met

together with company representatives. Thereafter, at least for a time, company representatives met with a different union each day on a rotating basis.

Invitations to the negotiations commencing April 2 were given not only to the TSC and MSC companies but also to the independents, including Commerce. However, there was little or no participation by the independents. Commerce attended none of the sessions. The effect was that the negotiations on behalf of all the companies were carried on by the representatives of the TSC and MSC.

The first phase of the negotiations concerned what are called "economic terms"—referring in general to wages, overtime rates, pension fund contributions and similar items. The second phase of the negotiations related to work rules and other items not covered by the economic terms.

By July 1969 the economic terms had been worked out. These terms were incorporated in memoranda of understanding relating to the different unions. Such a memorandum, relating to NMU and the tanker companies, was signed by NMU and the TSC on July 16, 1969. This memorandum was sent to Commerce for signature. Commerce signed and returned it to NMU on July 13, 1969.

Among other things, the NMU-tanker company economic terms provided that the tanker companies would guarantee pension fund payments to NMU under a formula which would provide a minimum of $44 million per year. It appears that this formula was intended to include both past service and present service obligations.[4]

With regard to the restraint on transfer clause, it was apparently assumed by all parties to the negotiations that

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[4] The guarantees turned out to be somewhat illusory. By 1972 the companies were behind in their contributions by several million dollars. NMU forgave the deficiency.

the clause, which had been adopted by MEBA and the TSC in May 1968, would be incorporated in all the collective bargaining agreements being negotiated in 1969. There is no evidence of any debate or dispute on the subject. J. M. Calhoon, president of MEBA, wrote a letter to Silver dated June 25, 1969 "confirming" the purpose of the May 1968 memorandum of understanding as to the restraint on transfer clause as follows:

> "The original and continuing purpose of said Memorandum is: To preserve the jobs and job rights of the Company's engineers covered by our collective bargaining agreement and to protect and maintain the wages, pension rights and othe reconomic benefits and working conditions provided such engineers under said Agreement."

The restraint on transfer clause was not included in the July 16, 1969 memorandum of understanding regarding the NMU-tanker company economic terms. It appears that this clause was formally agreed upon at some point during the balance of the contract negotiations, which lasted until sometime in December 1969.

Subsequent to July 1969, Commerce was sent three other memoranda of understanding relating to various provisions—on August 5, August 18 and September 30. None of these dealt with the restraint on transfer clause.

However, the restraint on transfer clause (Article I, Section 2) was included in the final agreement—the so-called "Bluebook," entitled "June 16, 1969-June 15, 1972 Agreement Between Various Tanker Companies and The National Maritime Union of America, AFL-CIO." Due to an oversight by NMU personnel, the companies were not actually requested to sign the final agreement or any

memorandum indicating their assent to it. However, the agreement was put into effect. Commerce made no objection to the restraint on transfer clause or to any other provision. Commerce does not deny that it was in fact a party to the final agreement, although Commerce never signed it.

It appears that the restraint on transfer clause was included in the other union contracts—*i.e.*, MEBA, MMP and ARA—negotiated in 1969 with both the tanker and non-tanker companies.

I reject the contention of Commerce and Vantage that the TSC and MSC, as far as any issue in this case is concerned, negotiated improperly for the benefit of the larger companies vis-a-vis the smaller companies such as Commerce. The restraint and transfer clause was a demand by the unions on all the companies, large and small. There is no evidence whatever to suggest that the larger companies promoted the restraint on transfer clause in any way, or regarded it as a device to benefit them at the expense of the smaller companies. As to the matter of maintaining the pool of contributors to the union pension funds, it is clear that this was one of the reasons why the *unions* demanded the restraint on transfer clause from *all* the companies. However, there is no evidence that the larger companies sought the restraint on transfer clause in order to lock smaller companies into the group of pension fund contributors. There is also no support in the evidence for the contention that the restraint clause was intended to encourage sales to foreign companies, thus reducing competition in United States flag trade.

Sale of the S.S. Barbara

As of late 1970 Commerce was owned by Vernitron Corporation of Great Neck, New York. The president of Com-

merce was Milton Pilalas. Herman S. Nathanson became president of Vernitron in November 1970.

Vernitron decided to discontinue its shipping business and to sell Commerce's two vessels—S.S. Thalia and S.S. Barbara. Nathanson took charge of the arrangements for the sale of the vessels. Because of disagreements between Pilalas and Vernitron, Pilalas had little participation in the dealings relating to the sales of the Thalia and the Barbara.

Nathanson was assisted by David Cohen, house counsel and assistant secretary of Vernitron. Vernitron also retained admiralty counsel—Kenneth Simon.

Final negotiations for the sale of the vessels took place in late December 1970. The prospective purchaser of the Thalia at this time was Tanker "Four Lakes," Inc. For the Barbara, it was Vantage Steamship Corp. The president of Vantage was Philip Corletta.

Simon was familiar with the restraint on transfer clause in the union agreements. The contract for the sale of the Thalia to Tanker "Four Lakes" contained a paragraph complying with that clause—*i.e.*, requiring the continuation of the same unions. This clause apparently presented no problem to Tanker "Four Lakes."

Simon prepared a draft contract for the sale of the Barbara to Vantage. This draft contained a paragraph about continuation of unions.

On December 22, 1970 the representatives of Vernitron—Nathanson, Cohen and Simon—met with Corletta of Vantage. In the midst of discussing various matters, there was a brief mention of the union continuation clause. Corletta said that the clause must be eliminated because Vantage was an SIU company. Nathanson or Simon asked about a possible union problem for Commerce. Corletta

replied that after the vessel was delivered this would be Corletta's problem.

The contract for the sale of the S.S. Barbara by Commerce to Vantage was signed December 23, 1970. It did not contain a union continuation clause. The vessel was to be delivered on or before February 28, 1971, although the time could be extended for certain specified reasons, or for any reason beyond Commerce's control, to April 4, 1971. The contract would be extended even after that date if Vantage did not give notice of cancellation.

Events Subsequent to Sale

A public announcement of the sales of the Thalia and the Barbara by Commerce was made on December 28, 1970. Word of the sales was picked up by NMU shortly thereafter. There apparently was no problem from NMU's standpoint regarding the Thalia. However, NMU was concerned about the Barbara being transferred to an operator under contract with SIU. On January 7, 1971 Mel Barisic of NMU called Pilalas of Commerce to inquire about the sale. On January 11 Barisic sent a letter to Commerce asking what steps would be taken to comply with Article I, Section 2 of the Commerce-NMU contract. On January 13 Pilalas responded by letter stating that he had no reason to believe that the same unions would not be continued on the Barbara following the sale.

At about this time, an NMU lawyer spoke to Corletta of Vantage on the telephone, requesting an undertaking from Vantage that Article I, Section 2 would be complied with. Corletta refused to give such assurance.

On January 25, 1971 NMU made a demand for arbitration of its rights under Article I, Section 2 respecting the sale of the Barbara. This resulted in the arbitration held

February 8 before Arbitrator Kheel and his decision in favor of NMU, all as described earlier in this opinion.

In the earlier portion of this opinion entitled "Prior Proceedings" I have described the main features of the complex litigation which occurred during 1971-1973. Certain other details must be added. These relate particularly to questions about (1) the frustration of the sale of the Barbara to Vantage and of a charter which Vantage had obtained for the Barbara; (2) the fixing of the injunction bond by Judge Frankel; and (3) the timeliness of the appellate remedies sought by Commerce and Vantage.

On the same day the arbitration occurred—February 8, 1971—Vantage entered into an agreement with Standard Oil of California ("SoCal") to charter the Barbara to SoCal for one year commencing some time between February 15 and March 5, 1971.

As stated earlier, NMU sued in this court on February 9, 1971 to obtain enforcement of Arbitrator Kheel's award of February 8.

At the time the complaint was filed, NMU presented an order to show cause for a hearing on a preliminary injunction motion to restrain the sale of the Barbara in violation of Article I, Section 2. Judge Wyatt signed the order to show cause setting the hearing on the preliminary injunction motion for February 16. The order to show cause also contained a temporary restraining order. Judge Wyatt fixed the amount of the bond for the TRO as $10,000.

On February 10 NMU and Commerce agreed to adjourn the hearing to February 23 and agreed that the TRO would remain in effect.

On February 11 NMU posted the required $10,000 bond. Under the terms of the bond the surety undertook

> ". . . that the Plaintiff [NMU] will pay to the Defendant [Commerce Tankers Corporation] so enjoined, such damages not exceeding the sum of Ten Thousand and No/100 ($10,000) as it may sustain by reason of the injunction, if the Court shall finally decide that the Plaintiff was not entitled thereto; such damages to be ascertained by a reference, or otherwise as the Court shall direct."

On February 18 Commerce filed papers supporting Vantage's motion to intervene which had been filed February 16. Commerce also opposed NMU's motion for a preliminary injunction and requested that the TRO be vacated, or in the alternative asked that NMU be required to post a bond in the amount of $2,750,000 to cover Commerce's potential loss of the ship sale and an additional bond to cover Vantage's potential loss of the SoCal charter.

Following a hearing on February 18, Judge Wyatt handed down a memorandum on February 19 granting Vantage's motion to intervene and holding that the temporary restraining order should be dissolved on condition that a bond be posted to cover contributions to the NMU pension fund. On February 22 Judge Wyatt signed an order based on that memorandum and fixing the amount of the bond as $278,361.

Commerce and Vantage agreed that each would provide half of this bond. Commerce arranged for its half. Vantage failed to provide its half.

The preliminary injunction motion was heard on February 23 by Judge Frankel. On that day he orally restored the TRO. On February 24 Judge Frankel signed an order continuing the TRO on the basis of a $10,000 bond posted

by NMU. On February 25 Judge Frankel signed a revised TRO, again fixing the bond at $10,000.

Judge Frankel's decision of March 2, holding that a preliminary injunction should issue prohibiting the sale of the Barbara in violation of Article I, Section 2, further held that the $10,000 amount of the TRO bond would be sufficient for the preliminary injunction. Judge Frankel stated that in his view the protestations of Commerce and Vantage regarding threatened financial loss were not impressive. Judge Frankel noted that Commerce and Vantage had simply ignored the Article I, Section 2 provision, and had made their contract without seeking a timely test before a court or arbitrator.

Judge Frankel's preliminary injunction of March 4 contained the provision:

> "ORDERED, that Plaintiff shall post a bond in the amount of Ten Thousand ($10,000.00) Dollars for the payment of such costs and damages as defendant may be found to have incurred should it hereafter be determined that this injunction was wrongfully issued."

Apparently none of the parties, in submitting proposed orders to Judge Frankel, considered the possible need to delineate the rights of Commerce and Vantage with respect to the bond or bonds. In any event, the caption of the order refers to Commerce as "Defendant" and Vantage as "Intervening Defendant." The paragraph in the order dealing with the bond refers only to a singular "defendant," which, literally read, would mean Commerce. In any event, no other bond was ever filed than the $10,000 bond filed in the TRO. The sole beneficiary of this bond is Commerce.

March 5, 1971 was the original deadline for delivery of the Barbara by Vantage to SoCal on the charter. This

deadline was orally extended. During the subsequent period of time there were intensive discussions regarding possible mechanisms for carrying out the SoCal charter for the Barbara. Vantage finally agreed that Commerce could charter the Barbara to SoCal, with Vantage reserving its right to sue Commerce for non-delivery of the vessel, and for profits derived from the charter. However, SoCal refused to accept this proposal and on March 11 notified Vantage that it considered the charter canceled. SoCal's cancellation was the result of complications regarding the injunction and union problems. The evidence shows that at least through the end of March SoCal would have chartered the Barbara if these problems had been resolved.

On March 12, 1971 Commerce requested Vantage to free Commerce to sell the Barbara to another buyer. This request was without prejudice to any alleged damage claims of Vantage. It is clear that, following the cancellation of the SoCal charter, Vantage did not in fact wish to proceed with the purchase of the Barbara, at least at the contract price of $2,750,000. However, until May 26, 1971, Vantage continued to formally insist upon the delivery of the Barbara in order to preserve Vantage's legal rights.

On March 18 Commerce obtained an order to show cause, returnable March 23, for a resettlement of Judge Frankel's order of March 4. The proposed revision was a paragraph stating that Commerce was free to sell the Barbara to a purchaser other than Vantage, who could comply with Article I, Section 2. On March 24 Judge Frankel denied this application.

As described earlier, Commerce at this time was involved in arbitration proceedings against Vantage under the aegis of the state court. Also, commencing in late May there was an NLRB proceeding, resulting in an action in the federal

court to obtain a preliminary injunction against NMU under 29 U.S.C. § 160(*l*), which was denied by Judge Croake on June 4, 1971.

However, Commerce and Vantage had a right of immediate appeal from Judge Frankel's injunction of March 4. The chronology which is now set forth shows that Commerce and Vantage chose not to prosecute this appeal on any urgent basis.

No notices of appeal were filed until Vantage did so on April 1 and Commerce on April 2. Commerce filed the record on appeal with the Second Circuit on May 12 and obtained an extension for filing its brief until June 20. On June 17 Commerce obtained another extension to July 20. On July 19 Commerce obtained a third extension to August 20, 1971.

On July 20 Commerce filed a motion in the Court of Appeals requesting that the preliminary injunction of Judge Frankel be suspended, modified or dissolved, or, in the alternative, that the bond required to be posted by NMU be increased to $2,750,000. On August 17 Commerce applied for an extension of another 60 days to file its brief. This proposed extension would have lasted until October 19, 1971.

On August 18 the Court of Appeals (Judges Feinberg, Mulligan and Timbers) denied the motion to vacate or amend the injunction and denied the request to increase the bond to $2,750,000. The court ordered that the appeal be expedited and that all briefs should be filed on or before September 29, 1971 with a hearing the week of October 4, 1971. This schedule was complied with.

As already described, the Court of Appeals considered together Judge Frankel's granting of the preliminary injunction in favor of NMU and Judge Croake's denial of

a preliminary injunction against NMU in the NLRB action. The Court of Appeals reversed both rulings on March 22, 1972, by which time the proposed sale of the Barbara to Vantage and the charter of the Barbara to SoCal were no longer feasible.

Neither Commerce nor Vantage made any attempt to obtain immediate or accelerated action by the Court of Appeals—either by motion for a stay, motion for an increased bond or swift prosecution of their appeal. Commerce's motion to suspend Judge Frankel's injunction or to increase the amount of the bond was not filed until 4½ months after the entry of the injunction. Due to Commerce's repeated requests for extensions of time for filing its brief, the appeal was not heard until seven months after the date of the injunction, and the hearing would have been delayed further had it not been for the deadline imposed by the Court of Appeals.

There is every reason to believe that, had Commerce and Vantage proceeded immediately in the Court of Appeals, they could have obtained expedited review. The viability of the transactions involving the sale and charter of the Barbara was clearly threatened by any appreciable delay. It is difficult to believe that the Court of Appeals would have ignored this. Exactly what response the court would have made to a request for immediate appellate action cannot, of course, be known. But Commerce and Vantage never attempted to obtain such relief.

It should be noted that in August 1971 Commerce had discussions through a broker regarding a possible sale of the Barbara to a company called Northeast Petroleum Company, for foreign flag operation. Northeast at first offered $1.3 million and then reduced its offer to $1 million. Northeast asked Commerce to obtain a letter

from NMU stating that NMU would not strike Northeast's United States facilities if Northeast bought the ship for foreign flag operation. Counsel for NMU supplied a letter which made no express concessions, but stated "the collective bargaining agreement is self-explanatory." The sale to Northeast Petroleum did not go through. To the extent that Commerce claims that NMU is responsible, I reject this argument. Certainly there is nothing in Article I, Section 2 which in any way prevented the sale of the Barbara to Northeast Petroleum.

Conclusions of Law

The Labor Statutes

At an earlier point in this opinion I summarized the arguments of Commerce and Vantage in support of their claims for damages under Section 303 of the Labor Management Relations Act, 29 U.S.C. § 187, and Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4). I reject each of these arguments and hold that neither Commerce nor Vantage has a valid claim under these provisions.

The argument that NMU coerced Commerce into entering into the collective bargaining agreement containing the restraint on transfer clause is contrary to the facts. Commerce was content to have the TSC representatives, who had the maximum bargaining power, negotiate on its behalf. Commerce declined the invitation to participate in the negotiations, and took no exception to the terms agreed to by its *de facto* representatives. The practical necessities of this type of bargaining do not constitute the type of coercion requisite for a violation of Section 8(b)(4).

I also reject the argument that the strike threat contained in Article I, Section 2 exerted coercion and force on Commerce and Vantage, causing the frustration of the sale of the Barbara to Vantage and the charter of the Barbara to SoCal. These arguments have no factual support. The strike provision in Article I, Section 2 did not prevent Commerce from making the agreement for the sale of the Barbara to Vantage. When it came to enforcing Article I, Section 2, NMU did not strike or threaten to strike. NMU went to arbitration and then to court. As to the SoCal charter, this was frustrated as a result of the preliminary injunction and the impatience of SoCal with the legal complications with NMU. SoCal did not cancel because of any coercion from a strike threat.

The final argument under Section 8(b)(4) advanced by Commerce and Vantage is that NMU restrained Commerce and forced Commerce to cease doing business with Vantage, by obtaining the preliminary injunction from Judge Frankel.

The Fifth Circuit Court of Appeals has analyzed the statute and legislative history, and has held that resort to a court for a judicial remedy is not coercion within the meaning of Section 8(b)(4). *Local Union No. 48* v. *Hardy Corp.*, 332 F.2d 682 (5th Cir. 1964). The court stated (p. 686):

> "We believe that the Congress used 'coerce' in the section under consideration as a word of art, and that it means no more than nonjudicial acts of a compelling or restraining nature, applied by way of concerted self help consisting of a strike, picketing or other economic retaliation or pressure in a background of a

labor dispute. Our view is supported by the legislative history."

On the basis of this well-reasoned authority, I reject the contention that NMU violated Section 8(b)(4) by seeking and obtaining a preliminary injunction.

Sherman Act

I have already found against the factual contentions of Commerce and Vantage regarding an alleged combination or conspiracy by the larger shipping companies to enhance their financial and competitive position. However, this leaves open the question as to whether the restraint on transfer clause in the collective bargaining agreement amounted to a *per se* violation of Sherman Act § 1. This, in turn, raises another question as to whether the restraint on transfer clause is exempt from the federal antitrust laws.

Both of these issues involve difficult and complex questions of law. The exemption problem depends upon the application of the recent Supreme Court decision in *Connell Construction Co.* v. *Plumbers and Steamfitters Union No. 100*, 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975), and earlier decisions, particularly *United Mine Workers* v. *Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), and *Meat Cutters Local 189* v. *Jewel Tea Co.*, 381 U.S. 676, 85 S.Ct. 1596, 14 L.Ed.2d 640 (1965). The *per se* violation question also presents numerous problems.

It is inappropriate and unnecessary for me to decide these questions. Even if Article I, Section 2 were held to violate Sherman Act § 1, under the facts of this case I would necessarily hold that such violation was not the proximate cause of the injuries sustained by Commerce and Vantage.

NMU took no action to implement or enforce Article I, Section 2 other than to seek a determination of its legal rights by arbitration and by resort to this court. Prior to NMU's commencement of litigation, Article I, Section 2 had not deterred Commerce or Vantage in any way. The provision had simply been ignored.

The proximate cause of the delay and final frustration of the S.S. Barbara transactions was the preliminary injunction issued by Judge Frankel in a case admittedly involving close and difficult questions of law. The problem created by the injunction was compounded by the long delay of Commerce and Vantage in seeking an appellate remedy.

There can be no recovery in this case on any theory of antitrust violation. Commerce and Vantage can recover only to the extent permitted by the specific rules relating to injuries suffered as a result of the granting of an injunction.

Remedy Regarding Injunction

Rule 65(c) of the Federal Rules of Civil Procedure provides:

> "(c) *Security.* No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof."

Appendix D

There has been some divergence of view as to the rights, if any, of a party to recover damages for injury resulting from a preliminary injunction later determined to have been erroneously issued. The resolution of the problem by the majority of the courts, both before and after the adoption of Rule 65(c) is as follows. In the absence of malicious prosecution, the seeking of injunctive relief is not a tort. However, a party obtaining a preliminary injunction may be required, as a condition of obtaining the injunction, to provide a bond or other undertaking to indemnify the defendant for injuries resulting from the injunction, if the injunction is later overturned. In such a case recovery by the injured party is limited to the amount of the bond or undertaking. *Associated General Contractors* v. *Illinois Conference of Teamsters,* 486 F.2d 972, 975, n. 6 (7th Cir. 1973); *United Motors Service, Inc.* v. *Tropic-Aire, Inc.,* 57 F.2d 479, 483 (8th Cir. 1932); 7 *J. Moore, Federal Practice* ¶ 65.10[1], at 65-98 (2d ed. 1975); Note, *Recovery of Damages on Injunction Bonds,* 32 Colum.L.Rev. 869, 871 (1932). The Court of Appeals for the Second Circuit summarized the rule as follows (Judge Learned Hand, joined by Judges Augustus Hand and Chase):

> "Any one who acts honestly and does not subject himself to a charge of malicious prosecution is as free from liability in invoking the action of a court as the court itself, and what he does under its order is not a wrong. The party aggrieved has no remedy except in so far as the court may have protected him by bond or otherwise, as a condition upon the order, and as security against its own errors." *In Re Spencer Kellogg & Sons,* 52 F.2d 129, 135 (2d Cir. 1931).

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Under this rule, the maximum liability of NMU with respect to the preliminary injunction is the amount of the $10,000 bond. As already described, this bond runs solely in favor of Commerce.

I have not made detailed findings with respect to the damages of Commerce resulting from the injunction. However, it is clear that such damages are in excess of $10,000. I hold that Commerce is entitled to judgment against NMU for $10,000 in 71 Civ. 582.

Since there is no bond in favor of Vantage, I hold that the complaint of Vantage in 72 Civ. 4619 must be dismissed. *Benz* v. *Compania Naviera Hidalgo, S.A.,* 205 F.2d 944, 948 (9th Cir.), *cert. denied,* 346 U.S. 885, 74 S.Ct. 135, 98 L.Ed. 389 (1953).

Commerce and Vantage assert that the preliminary injunction was entered under Section 7 of the Norris-LaGuardia Act, 29 U.S.C. § 107, and that damages in excess of the bond are recoverable under this statute, citing the Third Circuit decision in *United States Steel Corp.* v. *United Mine Workers,* 456 F.2d 483 (3d Cir.), *cert. denied,* 408 U.S. 923, 92 S.Ct. 2492, 33 L.Ed.2d 334 (1972). No extensive discussion of this point is necessary. In the proceedings before Judge Frankel, there appears to have been no reference to Section 7 of th Norris-LaGuardia Act. Both Commerce and Vantage, in their papers filed at the time, treated the application for preliminary injunction as being under Fed.R. Civ.P. 65. In any event, the weight of authority is contrary to the Third Circuit view, and holds that Norris-LaGuardia Act § 7 does not depart from the common law rule limiting recovery to the amount of the injunction bond. *Associated General Contractors* v. *Illinois Conference of Teamsters,* 486 F.2d 972, 975 (7th Cir. 1973);

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Int'l Ladies' Garment Workers' Union v. *Donnelly Garment Co.*, 147 F.2d 246, 252-53 (8th Cir.), *cert. denied*, 325 U.S. 852, 65 S.Ct. 1088, 89 L.Ed. 1972 (1945). *See also Hoh* v. *Pepsico, Inc.*, 491 F.2d 556, 560 (2d Cir. 1974); *Detroit Newspaper Pub. Ass'n* v. *Detroit Typographical Union No. 18*, 471 F.2d 872, 876 (6th Cir. 1972), *cert. denied*, 411 U.S. 967, S.Ct. 2149, 36 L.Ed.2d 687 (1973).

Miscellaneous Claims

The foregoing discussion is sufficient to dispose of the claim of Commerce and Vantage that NMU induced the breach of the contract for the sale of the Barbara. In other words, the answer to this claim is that the proximate cause of the asserted injuries was the preliminary injunction, and the remedy of Commerce and Vantage is limited to the injunction bond.

Vantage's contention that it is entitled to damages because NMU violated New York's Donnelly Anti-Trust Act can be disposed of on the basis of the clear holding in *Connell Construction Co.* v. *Plumbers and Steamfitters Union No. 100*, 421 U.S. 616, 635-37, 95 S.Ct. 1830, 1841-42, 44 L.Ed.2d 418, 433-34 (1975), that, even if there is no exemption from *federal* antitrust laws, there could be no application of state antitrust laws in a setting such as the present case.

With respect to NMU's contention that all claims of Commerce and Vantage are barred by the 1973 settlement between these parties, I reject this defense. The releases exchanged between the parties expressly reserved the rights of Commerce and Vantage against NMU.

Appendix D

Conclusion

The counterclaims of Commerce against NMU in 71 Civ. 582 are dismissed, except that Commerce is entitled to judgment against NMU on the second counterclaim in the amount of $10,000.

The complaint of Vantage in 72 Civ. 4619 is dismissed.

No costs are awarded as against any party.

NMU is directed to submit appropriate judgments.

So ordered.

Appendix E

(Opinion of Court of Appeals)

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Nos. 76-1227 and 76-1228

ADOLPH COORS COMPANY,

Plaintiff-Appellee, Cross-Appellant,

v.

A & S WHOLESALERS, INC.,

Defendant-Appellant, Cross-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

(D.C. No. C-4700)

Submitted: March 16, 1977

LEO N. BRADLEY of Bradley, Campbell and Carney, Golden, Colorado, *for Plaintiff-Appellee, Cross-Appellant Coors.*

Appendix E

RICHARD E. THIGPEN of Thigpen and Hines, Charlotte, North Carolina, and IRVIN M. KENT, Denver, Colorado, *for Defendant-Appellant, Cross-Appellee A & S.*

Before:

SETH, BARRETT, *Circuit Judges,* and
KERR,* *District Judge.*

BARRETT, *Circuit Judge.*

This suit was initiated by Adolph Coors Company (Coors), a Colorado corporation, on January 19, 1973, to enjoin A & S Wholesalers, Inc. (A & S), a North Carolina corporation, from purchasing Coors beer in Colorado from Colorado retailers and transporting it to North Carolina for resale to retail outlets.

Following a February 16, 1973, hearing, a Preliminary Injunction was entered enjoining A & S from obtaining Coors beer from Colorado retail outlets and transporting it to North Carolina for resale to wholesalers or retailers there. On June 5, 1973, A & S filed an Amended Answer and Counterclaim alleging that Coors, Coors Distributing Company and other persons unknown had combined and conspired to impose customer and territorial restrictions upon independent distributors, wholesalers and retailers in the sale of Coors beer. A & S prayed for damages and injunctive relief, alleging that Coors had violated §§ 1 and 2 of the Sherman Act, 15 U.S.C.A. §§ 1 and 2. The case was tried to the court following extensive and voluminous discovery consisting of depositions, affidavits and various

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* Of the District of Wyoming, sitting by designation.

and sundry documents. The evidence was essentially uncontroverted. On February 28, 1975, the court entered its Amended Memorandum Opinion and Order which (a) dismissed the Coors complaint and dissolved the preliminary injunction, (b) dismissed the A & S counterclaim insofar as it sought damages based on Coors' prosecution of the instant lawsuit, and (c) decreed that the A & S counterclaim based on Coors' alleged territorial and customer restrictions states a claim upon which relief may be granted. The aforesaid counterclaim was thereafter tried to a jury of six which found in favor of Coors on January 16, 1976. Judgment was subsequently entered on the verdict dismissing the A & S counterclaim. Both parties appeal.

We withheld and/or postponed any decision in this appeal until the United States Supreme Court had rendered a decision in the case of Continental T.V., Inc., et al. v. GTI Sylvania, Incorporated, No. 76-15, on Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. That decision was handed down on June 23, 1977, reported in 45 U.S.L.W. 4828, —— U.S. ——. The Supreme Court there expressly overruled the so-called *Schwinn per se* rule announced in United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), which this court applied in Adolph Coors Co. v. F.T.C., 497 F.2d 1178 (10th Cir. 1974), *cert. denied,* 419 U.S. 1105 (1975). In a footnote, the Supreme Court observed that in our 1974 decision we had urged the Supreme Court ". . . to consider the need in this area for greater flexibility." 45 U.S.L.W. 4831. In that respect we said: "Although we are compelled to follow the *Schwinn per se* rule rendering Coors' territorial restrictions on resale illegal *per se,* we believe that the *per se* rule should yield to situations where a unique product requires territorial restrictions to remain in business . . . Perhaps the Supreme Court may see the wisdom of grafting an exception to the *per se* rule when a product is unique and the manufacturer can justify its territorial restraints under the rule of reason. White Motors Co. v. United States, 372 U.S. 253 . . ." 497 F.2d at 1187. We hasten to observe that we did not there hold that the Coors territorial restraints were *in fact* justified under the rule of reason. That issue was not before us. In any event, denial of certiorari by the United States Supreme Court imports no expression of opinion on the merits. Sunal v. Large, 332 U.S. 174 (1947).

We are required to test the contentions on appeal—to the extent directly applicable—measured by the law ". . . in effect at the time it [the appellate court] renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Bradley v. Richmond School Board, 416 U.S. 696, 711 (1974); United States v. Alabama, 362 U.S. 602 (1960); Mustang Fuel Corp. v. Youngstown Sheet & Tube Company, 516 F.2d 33 (10th Cir. 1975); Chicago, Rock Island & Pacific Railroad Company v. Hugh Breeding, Inc., 247 F.2d 217 (10th Cir. 1957), dismissed, 355 U.S. 880 (1957); Lytle v. Commissioners of Election of Union County, 541 F.2d 421 (4th Cir. 1976), U.S. appeal pendg.; Parrish v. Board of Commissioners of Alabama State Bar, 524 F.2d 98 (5th Cir. 1975), *cert. denied,* —— U.S. ——; Ybarra v. City of San Jose, 503 F.2d 1041 (9th Cir. 1974); 21 C.J.S., Courts, §194. Applying this rule, we are guided on appeal by the law announced in *Continental T.V., Inc., supra.*

The Supreme Court in Continental T.V., Inc., et al. v. GTE Sylvania Incorporated, supra, held in pertinent part:

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We conclude that the distinction drawn in *Schwinn* between sale and nonsale transactions is not sufficient to justify the application of a *per se* rule in one situation and a rule of reason in the other. The question remains whether the *per se* rule stated in *Schwinn* should be expanded to include nonsale transactions or abandoned in favor of a return to the rule of reason. We have found no persuasive support for expanding the rule. . . .

We revert to the standard articulated in *Northern Pac. R. Co.* [Northern Pac. R. Co. v. United States, 356 U.S. 1 (1958)] and reiterated in *White Motor* [White Motor Co. v. United States, 372 U.S. 253 (1963)], for determining whether vertical restrictions must be "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." 356 U.S., at 5. . . . Certainly, there has been no showing in this case, either generally or with respect to Sylvania's agreements, that vertical restrictions have or are likely to have a "pernicious effect on competition" or that they "lack . . . any redeeming virtue." Accordingly, we conclude that the *per se* rule stated in *Schwinn* must be overruled. In so holding we do not foreclose the possibility that particular applications of vertical restrictions might justify *per se* prohibition under *Northern Pac. R. Co.* But we do make clear that departure from the rule of reason standard must be based upon demonstrable economic effect rather than—as in *Schwinn*—upon formalistic line drawing.

45 U.S.L.W., at pp. 4833, 4834.

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To the extent, then, that the law announced in *Continental T.V., Inc., supra,* applies to the facts and circumstances contained in the record on appeal, we will dispose of those issues; otherwise the case must be remanded for further proceeding.

A & S appeals from the judgment dismissing that portion of its counterclaim based upon Coors' prosecution of the instant lawsuit and from the verdict and judgment relating to that portion of the counterclaim tried to the jury. A & S alleges that the trial court erred, especially in its failure to instruct the jury that the acts of Coors complained of constituted a *per se* violation of the Sherman Antitrust Act.

Coors cross-appeals from the trial court's denial of its Motion for Directed Verdict and from the award to A & S of $7,500.00, representing costs and damages pursuant to Coors' bonds posted upon its application for injunctive relief in that identical amount.

A recitation of the factual background, largely undisputed, should aid in our disposition of the legal issues presented.

Coors owns and operates a single brewery at Golden, Colorado, from which it produces and markets a beer product which is in great national demand. Coors is presently the fourth largest brewery in terms of national consumption even though it has historically limited its territorial marketing area to ten and one-half of the western states. Its brewery has produced at full capacity for years but, even so, there have been many occasions when the demand has outstripped production.

Coors markets its beer products through some 167 independent wholesale distributors in the established marketing area, where it enjoys an average market penetra-

tion of about 36.40 percent, notwithstanding that its beer products retail for substantially higher prices than its major competitors. Coors has steadfastly maintained that the quality of its beer is the result of its unique brewing and distributing process, which requires refrigeration. Coors is the only "shipping" brewery, in that it ships all of the beer brewed at its plant in Golden to the various distributors in refrigerated units. The beer is made by the aseptic brewing process which requires refrigeration. In order to maintain the quality of its product, Coors requires that its distributors adhere to a program which requires refrigeration controls and proper and regular rotation. Coors representatives regularly monitor the program in order to "protect the integrity" of the Coors product. These standards are spelled out in the Coors Distributorship Contract and Policy Manual. Coors has established and maintained "vertical" restrictions on its marketing territory within which its beer products may be sold in order to guarantee their "integrity."

A & S is a North Carolina wholesaler licensee. Its agents and representatives traveled from North Carolina to Colorado where they purchased large quantities of Coors beer (hundreds of cases) from John Schultz, a Colorado retail licensee operating from a store in Denver, Colorado. Schultz had obtained a North Carolina nonresident liquor wholesaler's permit on December 27, 1972, but at no time did he hold a federal basic beer wholesaler's permit. A & S purchased the beer from Schultz at or near the Colorado retail prices. It sold the beer, following its delivery to Charlotte, North Carolina, at a substantially increased retail price. A & S actively assisted Schultz in obtaining the North Carolina permit, which was necessary under the law of that State in order to supply

the A & S operation. This involved, *inter alia*, securing state approval of the Coors label and product, all without Coors' authorization or consent. When Coors became aware of the arrangement between A & S and Schultz, it initiated this suit.

I.

We will first consider the contentions raised on appeal by A & S. To the extent that our discussion "flows over" involving Coors' cross-appeal we will relate to the same factual settings.

The A & S Contentions

A & S contends that the trial court erred in (1) failing to find and/or conclude as a matter of law, that Coors' filing and continued prosecution of this suit, including the filing of its cross-appeal, was a part of its firm and resolute effort to enforce its illegal territorial restrictions on the resale of its beer products, after it had parted with title, risk and dominion over them, in violation of Section 1 of the Sherman Act, as sham litigation, (2) failing to instruct the jury that Coors' efforts at firm and resolute enforcement of territorial restrictions on the resale of its products constituted a *per se* violation of Section 1 of the Sherman Act, and (3) limiting the damages recoverable by A & S Wholesalers, Inc. as a result of the wrongful granting of the Temporary Restraining Order and the Preliminary Injunction to $7,500.00, representing the exact amount of the bonds posted by Coors.

(1)

When Coors filed the instant suit on January 19, 1973, it had steadfastly maintained that it had an absolute and

unqualified right to not only determine the area within which its beer products were to be marketed, but the right to impose certain controls over the products, following sale, then in the hands of the wholesalers and retailers in order "to protect the quality and integrity" of the products. Such was the Coors contention when the trial court issued the preliminary injunction. Our opinion in Adolph Coors Company v. Federal Trade Commission, *supra,* had not then been rendered. While that case involved Coors' competitive restrictions imposed on wholesalers within Coors' fixed marketing area and did not, as the trial court correctly observed, involve the use of restrictions to limit the marketing of its beer products to that area, still the decision was firmly anchored to United States v. Arnold Schwinn & Co., *supra:* We held that the *Schwinn per se* rule rendered Coors' territorial restrictions on resale illegal *per se* on the basis that once the manufacturer (Coors) ". . . has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred—whether by explicit agreement or by silent combination or understanding with his vendee—is a *per se* violation of the Sherman Act." 388 U.S. at 382 quoted at 497 F.2d at 1186.

The district court correctly noted that prior to our decision above referred to, ". . . there was some authority that consideration of potential manufacturer liability to consumers and public safety would exempt from the *Schwinn* rule of *per se* illegality restraints on alienation of some types of products." [Cases cited.] [R., Vol. XXVIII, p. 285.]

The trial court rejected the A & S allegations that Coors instituted the instant lawsuit without probable cause in

order to suppress competition in violation of the antitrust laws as proscribed in California Motor Transport v. Trucking Unlimited, 404 U.S. 508 (1972). There allegations had been made that certain motor carriers had conspired to monopolize by means, *inter alia,* of harassing judicial proceedings. The Court there recognized that the use of judicial or administrative processes under the pretense of obtaining a favorable decision may, in fact, be a sham if the true purpose is that of unlawfully interfering directly with the lawful business pursuits of a competitor. We agree with the trial court's finding that A & S has failed to prove that Coors initiated and pursued the instant action as a "sham." We concur that Coors proceeded in a "genuine attempt to secure a decision from the court on the merits . . . there has been no evidence that plaintiff's [Coors'] lawsuit was a mere sham to cover an attempt at direct interference with the defendant's [A & S'] business." [R., Vol. XXVIII, p. 292.] We agree with the trial court's finding that nothing in this record subjects Coors to Sherman Act liability imposed under the "sham" exception to the rule as invoked in California Motor Transport Co. v. Trucking Unlimited, *supra,* and Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

Further support for the trial court's finding that Coors' initiation and pursuit of this litigation—and its active efforts to accomplish state legislation within its marketing area to protect the territorial restrictions imposed in its contracts with its distributors—was not a "sham" is, we suggest, found in the fact that when this case was orally argued there was then pending before the United States Supreme Court Case No. 76-15, entitled Continental T.V., Inc. v. GTE Sylvania, Inc., *supra,* which resulted in the high Court's overruling of the *Schwinn per se* rule. The

very fact that the Supreme Court accepted certiorari there to review the *Schwinn* rule belies any element of bad faith or sham on the part of Coors.

(2)

A & S contends that the trial court erred in failing to instruct the jury that Coors' efforts at firm and resolute enforcement of territorial restrictions on the resale of its products constituted a *per se* violation of Section 1 of the Sherman Act.

We see no merit in this contention inasmuch as it relies almost exclusively on the same predicate discussed in (1) above: "A & S was entitled . . . to have the jury informed that the vigorously enforced territorial restrictions of Coors was a *per se* violation of the Sherman Act and that all that they had to determine was the fact ~~and amount~~ of damages." [Brief of A & S, Appellant, Cross-Appellee, p. 23.] The Supreme Court decision in Continental T.V., Inc. v. GTE Sylvania Incorporated, *supra*, disposes of this issue adversely to A & S.

(3)

A & S charges that the trial court erred in limiting the damages recoverable by A & S as a result of the wrongful granting of the Temporary Restraining Order and the Preliminary Injunction to the sum of $7,500.00, representing the exact amount of the bonds posted by Coors.

A & S concedes, significantly, that the general rule is that damages resulting from a wrongfully granted injunction are limited to the amount of the bond unless it is established that the injunction was obtained maliciously and without probable cause. *See:* A & S Brief, Appellant, Cross-Appellee, p. 23 and cases cited in support thereof: Jamaica Lodge v. REA, 200 F. Supp. 253 (D. N.Y. 1961);

Northeastern Airlines, Inc. v. World Airways, Inc., 262 F. Supp. 316 (D. Mass. 1966). A & S contends, of course, that the litigation initiated and prosecuted by Coors (particularly that following the filing of our opinion in Adolph Coors Company v. Federal Trade Commission, *supra*), was "totally unjustified" and maliciously brought and maintained. A & S relates back to its basic contentions on the issue of "sham litigation" discussed in (1), *supra*. We have, of course, already disposed of that contention adversely to A & S.

Following the jury's verdict and the judgment in favor of Coors, A & S renewed a prior Motion for Assessment of Costs and Damages under the bonds posted as security per the court's orders pursuant to Fed. Rules Civ. Proc., rule 65(c), 28 U.S.C.A. This statute grants discretion in the district court to fix the amount of the security an applicant for restraining order or preliminary injunction must post, for the payment of costs and damages "as may be incurred or suffered" by reason of a party being wrongfully enjoined or restrained.

The general rule is that absent proof of malice in obtaining injunctive relief, a party cannot be liable in damages resulting from a wrongfully or erroneously granted injunction beyond the limits or maximum amount of the bond or bonds. Atomic Oil Company of Oklahoma, Inc. v. Bardahl Oil Company, 419 F.2d 1097 (10th Cir. 1969), *cert. denied*, 397 U.S. 1063 (1970); K-2 Ski Company v. Head Ski Co., Inc., 506 F.2d 471 (9th Cir. 1974); First Citizens Bank & Trust Co. v. Camp, 432 F.2d 481 (4th Cir. 1970); Benz v. Compania Noviera Hidalgo, S.A., 205 F.2d 944 (9th Cir. 1953), *cert. denied*, 346 U.S. 885 (1953); International Ladies' Garment Workers' Union v. Donnelly Garment Co., 147 F.2d 246 (8th Cir. 1945), *cert. denied*, 325 U.S. 852

(1945); National Maritime Union of America, AFL-CIO v. Commerce Tankers Corporation, 411 F. Supp. 1224 (D.C. N.Y. 1976); Progressive Steelworks Union v. International Harvester Corp., 70 F.R.D. 691 (D.C. Ill. 1976); Moore's Federal Practice, Second Ed., Col. 7, §65.10[1]; Wright and Miller, Federal Practice and Procedure, Civil, Vol. 11, §2954.

While certainly the trial court did not err in limiting Coors' liability to the face amount of the bonds under the facts, circumstances and then prevailing law, including the applicable *Schwinn per se* rule, we must nevertheless set aside the trial court's order relating to the liability on the bonds and remand for such further proceedings the court deems necessary and proper in light of the Supreme Court opinion rendered in Continental T.V., Inc., et al v. GTE Sylvania, Incorporated, *supra*. Under the *Schwinn* doctrine, a manufacturer's vertical restrictions on its dealers' territories or potential customers were held to be illegal *per se* under §1 of the Sherman Act once the manufacturer parted with dominion (by sale) over its goods. *Continental T.V., Inc., supra,* in overruling the *Schwinn per se* doctrine, holds that even should a manufacturer retain dominion or control with respect to these goods, and if the dealers' positions and functions are indistinguishable from those of an agent or salesman of the manufacturer, then the restrictions are examined via the *rule of reason*. Under that rule we must test Coors' contentions that the restrictions and controls it imposes [as more fully set forth in Coors v. FTC, *supra*] are within the *rule of reason*, i.e., whether they are required in order to protect and insure the "quality and integrity" of its beer products. That test must be first presented and ruled upon by the trial court. It may necessitate a full evidentiary proceeding. In White Motor

Co. v. United States, *supra*, the Supreme Court addressed this problem:

> . . . A vertical territorial limitation may or may not have that purpose or effect. [no purpose except that of stifling of competition] We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain. They may be too dangerous to sanction or they may be allowable protections against aggressive competitors or the only practicable means a small company has for breaking into or staying in business, (cf. *Brown Shoe, supra,* at 330; *United States* v. *Jerrold Electronics Corp.,* 187 F. Supp. 545, 560-561, aff'd, 365 U.S. 567) and within the "rule of reason." We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a "pernicious effect on competition and lack . . . any redeeming virtue" (*Northern Pac. R. Co.* v. *United States, supra,* p. 5) and therefore should be classified as *per se* violations of the Sherman Act.
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> 372 U.S., at 263.

Coors Contentions on Cross-Appeal

We now turn to the contentions presented by Coors on its cross-appeal. They are: (1) that the trial court erred in ordering Coors to pay A & S the amount of $7,500.00, representing the full amount of the two bonds posted by Coors as security for the entry of the Temporary Restraining Order and the Preliminary Injunction, (2) that the trial court erred in determining that the A & S counterclaim set forth a valid cause of action because, (a) A & S lacked standing under the antitrust laws as a result of its

violation of state and federal laws, (b) Coors and its distributors have the absolute right to deal with whomever they choose, (c) statutes enacted pursuant to the Twenty-First Amendment may function as a bar to antitrust actions, and (3) that the trial court erred in failing to direct a verdict in favor of Coors at the close of A & S' evidence and at the close of all the evidence.

(1)

Coors alleges that the trial court erred in ordering it to pay A & S the amount of $7,500.00 representing the full amount of the two bonds posted by Coors as security for entry of the Temporary Restraining Order and the Preliminary Injunction.

This contention has heretofore been discussed and disposed of, under part 3 of the A & S contentions. We observe that even though this matter is to be determined anew on remand, Coors is in error in its contention that it could not be held liable on the bonds unless the evidence established that it prosecuted the instant case maliciously. Such, of course, is not the standard. The liability may be imposed and the applicant for injunctive relief may be held liable within the limits of the amount of the bonds for damages resulting from their wrongful or erroneous grant. Atomic Oil Company of Oklahoma, Inc. v. Bardahl Oil Company, *supra,* and authorities cited in part (2) of I above.

The trial court's order fixing the Coors liability on the two bonds is set aside and, upon remand, the trial court may undertake such further or other proceedings deemed necessary and proper in light of *Continental T.V., Inc., supra.*

(2)

Coors contends that the trial court erred in finding that A & S' counterclaim set forth a valid cause of action based upon the allegation that Coors' alleged territorial and customer restrictions were violative of the antitrust laws. The basic premise of the Coors contention here is that the A & S conduct is not within the protected zone of the antitrust laws and that A & S lacks standing because it was in violation of both state and federal law, as was retailer Schultz, constituting cause for suspension or revocation of the licenses and permits necessary for A & S to do business. Under these circumstances, argues Coors, A & S is precluded from invoking the protection of the antitrust laws.

The primary contention by Coors of A & S' violation of Colorado's liquor laws is that Schultz, a retail licensee from whom A & S obtained the major source of its supply of Coors beer, was not licensed to "sell at wholesale" which is defined as "selling to any other than the intended consumer." C.R.S. (1963) §75-2-4 (18), (Supp. 1969). In addition, Coors alleges that Schultz was an agent of A & S and that his unlawful conduct must be imputed to A & S. In regard to violation of federal law, Coors contends that inasmuch as Schultz did not hold a federal beer wholesaler's permit as required by 27 U.S.C.A. §203(c) that his sales to A & S were unlawful.

The trial court concluded that the above defenses urged by Coors were related to that which the court characterized as the ". . . now thoroughly discredited defense of *in pari delicto* or contributory illegality." [R., Vol. XXVIII, p. 287.] The court found that such defenses had been consistently rejected in the antitrust context, citing to Perma Life Mufflers, Inc. v. International Parts Corp., 392 134

(1968). The court also concluded that the alleged violations of the Colorado and Federal licensing laws, even if attributable to A & S, do not provide Coors with any protection from the liability provisions of the Sherman Act, inasmuch as neither the Colorado Liquor Code nor the Federal Alcohol Administration Act (27 U.S.C.A. §201, et. seq.) purport to permit combinations, otherwise in restraint of trade, to bring about their enforcement as a bar to an antitrust action. In relation to the alleged violation of North Carolina law, the court found that the North Carolina Board of Alcoholic Control had interpreted the laws of that State contrary to Coors' contentions.

In Semke v. Enid Automobile Dealers Association, 456 F.2d 1361 (10th Cir. 1972), we said, *inter alia:*

> . . . The underlying basis for the *Perma Life* decision is the superior public interest in enforcing even by private action the antitrust laws. As the Court put it, the weighing of the relative moral worth of the parties would seriously undermine the value of the private action in antitrust enforcement. If participation by a plaintiff in an illegal conspiracy in restraint of trade is not to bar him, it follows that his violation of a state statute which is unrelated to the antitrust laws would carry even less moral impact and would assume even less applicability as a barrier to an antitrust suit.
>
> Since the policy values inherent in the antitrust statutes even more clearly outweigh any social value flowing from a state licensing statute such as the instant Oklahoma one, we conclude that the district court erred in refusing to distinguish between a conspiracy to activate state processes, including the obtaining of an injunction (which actions as we see them are within

> the *Parker-Noerr* exemption), and on the other hand preemption of the area by a state statute, to the extent that it would of itself bar and exclude an antitrust action. Giving this effect to the state statue would extend substantially the *Parker-Noerr* exemption and would at the same time have the effect of disregarding the public policy objectives of the antitrust laws.
>
> 456 F.2d, at pp. 1369, 1370.

See also: Simpson v. Union Oil Co., 377 U.S. 13 (1964); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951); Greene v. General Foods Corporation, 517 F.2d 635 (5th Cir. 1975), *cert. denied,* 424 U.S. 942 (1976); American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230 (3rd Cir. 1975).

The trial court did not err in concluding that the alleged illegal acts of A & S and Schultz do not constitute a defense to the alleged Sherman Act violations attributed to Coors.

(3)

Coors contends that the powers given to the states by the Twenty-First Amendment to the United States Constitution do not permit federal limitations under the commerce clause. Inasmuch as the Twenty-First Amendment vested the regulation of traffic within the borders of the respective states to the states, Coors argues that this, by necessary implication, denies application of federal antitrust laws which would defeat state policy governing the traffic of alcoholic beverages.

The trial court found that Colorado has not exercised its Twenty-First Amendment power in a way which would give sanction to territorial or customer restrictions pro-

hibiting the Coors product from ever leaving the State of Colorado. While recognizing that the Colorado statutes do seem to sanction vertical restrictions which have the effect of eliminating inter-territorial competition between Coors wholesalers [C.R.S. (1973) §§12-47-108(2) and 12-47-124(4)], the trial court stated that there are no statutes sanctioning customer or territorial restrictions imposed "... down the line of distribution on retailers and do not purport to allow the manufacturer or the brewer control over the ultimate disposition of his product." [R., Vol. XXVIII, p. 289.] We agree. The interpretations of Colorado statutes urged upon us by Coors under its Twenty-First Amendment contentions have not been passed upon or decided by the Colorado state courts. Thus, in the absence of controlling state decisions or precedents, the views of a federal district judge who is a resident of that state carry extraordinary weight on appeal. In re Cox, 543 F. 2d 1277 (10th Cir. 1976); Matthews v. IMC Mint Corporation, 542 F.2d 544 (10th Cir. 1976). Our independent research leads us to conclude that the court did not err in its conclusion that "... the state's power to regulate liquor traffic under the Twenty-First Amendment provides the plaintiff with no defense to the antitrust counterclaim here asserted." [R., Vol. XXVIII, p. 290.]

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.